Petition

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81-1484

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. _____

J. L. ALLISON, JR., ET AL., *Petitioners,*

V.

THE CONTINENTAL GROUP, INC., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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February, 1982

QUESTIONS PRESENTED

For the first time in its judicial history, on rehearing, the Supreme Court of Louisiana reversed its own, original seven to zero (7-0) opinion. The Opinion on Rehearing violates the provision of the Louisiana Constitution requiring a majority of the members of that Court to concur to render judgment. See App. p. A-8. In doing so, the Louisiana judgment also violates the Constitution of the United States and presents the following questions:

A. Whether a final judgment of the Supreme Court of Louisiana violates the Contract Clause of the United States Constitution when it changes laws and interpretation of laws in effect when the contract at issue was executed.

B. Whether a final judgment of the Supreme Court of Louisiana, rendered in violation of a mandate of the Louisiana Constitution, deprives Petitioners of their property without the due process of law guaranteed them by the Fourteenth Amendment to the United States Constitution.

C. Whether a final judgment of the Supreme Court of Louisiana, rendered in violation of a mandate of the Louisiana Constitution, deprives Petitioners of the equal protection of the law guaranteed them by the Fourteenth Amendment to the United States Constitution.

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NUMBER _____

J. L. ALLISON, JR., ET AL.
Petitioners

v.

THE CONTINENTAL GROUP, INC.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

J. L. Allison, Jr., et al.[1] pray that a writ of certiorari issue to review the judgment and decree of the

[1]Petitioners are:
J. L. Allison, Jr., Martha Burton Allison, Frances S. Bolton, Donald E. Brown, Max McLean Brown, Bess N. Burton, Elizabeth K. Burton, J. B. Burton, III, Estate of Lillian Lester Burton, P. D. Burton, Jr., Patricia Ann Burton Cross, Adine W. Dalrymple, Susan Lewis Ford, Charles Wesley Goyer, Jr., G. W. Goyer, Jr., and Newton P. Allen, Co-Administrators for the Estate of Mrs. Lida Belle Brame Goyer, Sara Scott Hargrove, John Allen Harrel, Nicholas D. Harrel, II, Nicholas M. Harrel, Jr., Thomas H. Harrel, Tracy L. Harrel, Sr., Nancy McCullough Humphrey, Harriett Alexander Jennette (Simecheck), Jeanette Johnson Jennette, Charles Lee Jennette, III, Albert Sidney

Supreme Court of the State of Louisiana entered in this cause on June 22, 1981, reversing the judgment of the Court of Appeal, Second Circuit, State of Louisiana rendered on October 30, 1979.

I.

OPINION BELOW

A copy of the opinion of the Supreme Court of Louisiana to which this petition is addressed is an appendix to this petition at page A-9; it is reported at 404 So.2d 428. Petitioners timely filed an application to the Supreme Court of Louisiana for rehearing which was denied by order entered on October 9, 1981. See App. p. A-36.

On December 8, 1981, Petitioners filed a motion to vacate and set aside the judgment of the Supreme Court of Louisiana on the grounds that it violated the Constitutions of the United States and Louisiana. See App. p. A-94. On January 8, 1982, that Court refused to consider the motion, but two Justices noted the mo-

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Johnson, Hattie A. Johnson, Louise Burton Lavender, Charles Huffman Lewis, Jr., Jen Moore Lewis, Margaret Johnson Long, T. W. M. Long, James Robinson Madison, John Meek Madison, Jr., Stewart Mather Madison, Ruth R. Marshall, Rosalind Kalmbach McCullough, Mary Jane Patton McGill, Lillian Gladys Burton Moore, Nathaniel E. Mulkey, Ruth Harrel Mulkey, Eleanor Ewing Murphey, Martha Burton Allison Parnell, John Will Patton, III, Nicholas Harrel Patton, Elizabeth Burton Peck, George Wilbur Peck, St. James Episcopal Church, Guy Sample, Oliver H. P. Sample, Wilton Wade Sample, Beatrice Stewart Speer, Frances Perry Stewart, Ned Alexander Stewart, Jr., Cora Mary Burton Triplett, William H. Triplett, Jr., Kathrine S. Tyrrell, Elizabeth Harrell Walker, J. F. Walker, Jr., Adine Lampton Wallace, W. Scott Wilkinson, Succession of Frances Terrell Wheless and Vernon W. Woods.

tion should have been considered.[2] See App. p. A-100.

The opinion of the Court of Appeal, Second Circuit, State of Louisiana is at App. p. A-38. It is reported at 379 So.2d 1117.

The unreported opinion of the Eleventh Judicial District Court, DeSoto Parish, Louisiana, is at App. p. A-74.

II.

JURISDICTION

The final judgment of the Supreme Court of Louisiana was entered on June 22, 1981, rehearing was denied on October 9, 1981, and under the laws of the State of Louisiana became final that date.

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[2]CALOGERO and WATSON, J.J. dissent. We would consider this Motion to Vacate and Set Aside Judgment as an application for rehearing and grant same. Applicant has been afforded no opportunity in this Court to raise the issue presented in this motion. It was only after this Court denied the rehearing application that applicant received a copy of the concurring opinion of one Justice of this Court, creating a vote lineup which is the substance of the pleading presently filed. Since our rules do not provide for second application for rehearing by a given losing party, we would consider the complaint under our supervisory jurisdiction, forge a reasonable rehearing opportunity and entertain the complaint now, rather than have applicant protest the effect of this judgment again in the trial court or seek relief on alleged constitutional violations in the Federal courts.

The issue raised is a serious one. We should at least entertain it. Applicants contend that four, perhaps five members of this Court have concluded that vendors retained the lignite rights, and only three members of this Court have held that their right to explore for that lignite has prescribed. Yet they have lost their valuable mineral deposits.

Not considering this application should not be the course taken at this juncture by this Court.

The judgment of the Supreme Court of Louisiana, of which review and reversal are sought is, under the judicial and procedural systems of Louisiana, the judgment of the highest Court of the State of Louisiana in which a decision in this cause could be had. The judgment also is final, within the meaning of the jurisdictional statute, *United States Code*, Title 28, Section 1257 (3) App. p. A-3.

III.

QUESTIONS PRESENTED

For the first time in its judicial history, on rehearing, the Supreme Court of Louisiana reversed its own, original seven to zero (7-0) opinion. The Opinion on Rehearing violates the provision of the Louisiana Constitution requiring a majority of the members of that Court to concur to render judgment. See App. p. A-8. In doing so, the Louisiana judgment also violates the Constitution of the United States and presents the following questions:

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C. Whether a final judgment of the Supreme Court of Louisiana, rendered in violation of a mandate of the Louisiana Constitution, deprives Petitioners of the

equal protection of the law guaranteed them by the Fourteenth Amendment to the United States Constitution.

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

ARTICLE I

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF LOUISIANA

Article 5, Section 3, App. p. A-8.

STATUTES INVOLVED

Louisiana Acts 1958, No. 332, App. p. A-4.

Louisiana Mineral Code

La. R. S. 31:36, App. p. A-6.
La. R. S. 31:40, App. p. A-6.

Louisiana Revised Statutes

La. R. S. 30:112, App. p. A-5.

Louisiana Civil Code

Articles 796 and 798, App. p. A-7.

V.

STATEMENT OF THE CASE

In 1956, Mansfield Hardwood Lumber Company ("Mansfield") sold approximately 92,000 acres of Louisiana land to Robert Gair Company.[3] In the relevant acts of sale Mansfield specifically reserved all mineral rights by use of the following pertinent language:

> "There is expressly excluded from this sale, and the vendor reserves, *all mineral rights* in the lands conveyed hereunder and *all mineral rights*, if any the vendor may own in and to the lands described which are affected by said leasehold instruments, with the right of ingress and egress for the proper exploitation of the same. The vendor or its lessee, shall pay the vendee for all damage done to timber, wood or other forest products on the property of the vendee on the lands conveyed hereunder and the lands above described which are affected by said leasehold instruments, in connection with operations by the vendee or its lessee in the course of such exploitation and shall

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[3]Petitioners are former shareholders and/or their successors of Mansfield Hardwood Lumber Company, which was dissolved shortly after the referenced sale. Respondent is the successor in title to Robert Gair Company, Inc.

> assume payment of, and pay any taxes levied on all minerals produced from such operations, or the increase in the value of the land, if any, caused thereby or by the equipment placed thereon in connection with such exploitation." (emphasis added)

Mineral lessees of Petitioners have conducted oil and gas operations on, and obtained production from, pertinent portions of the lands since 1956. (Under Louisiana law, the right reserved in the 1956 Acts of Sale is known as a servitude. A landowner selling land may reserve such a servitude and explore for and reduce to possession the minerals found on or under the lands sold. If the servitude is not used within ten (10) years of its creation, it is extinguished, and the right to explore for and possess the minerals reverts to the landowner. La. R. S. 31:27. If the servitude is used, prescription is interrupted.)

In 1977, Respondent filed a petition for declaratory judgment in the Eleventh Judicial District Court, DeSoto Parish, Louisiana, seeking a judgment that the servitudes created by the reservations in the Acts of Sale included only the right to explore for and exploit oil, gas and kindred minerals and not the right to explore for and strip mine for solid minerals such as lignite. Alternatively, Respondent sought a judgment that, if the mineral reservation reserved unto Petitioners the right to explore for solid minerals such as lignite, then that right had prescribed under Louisiana law since Petitioners did not explore for solid minerals within ten (10) years after the 1956 Act of Sale.

The Trial Court granted the declaratory judgment prayed for by Respondent, holding that the parties to the Act of Sale did not intend for Mansfield to reserve the right to exploit solid minerals on the lands it sold. See App. p. A-74.

The Court of Appeal, Second Circuit, State of Louisiana, reversed the Trial Court decision and held that under the peculiar circumstances of the case, the parties had, in fact, intended to include in the mineral reservation the right for Mansfield to exploit all mineral rights, including lignite coal. The Court of Appeal also held that use of the pertinent mineral servitudes through oil and gas operations interrupted prescription as to the right to exploit solid minerals, including lignite.[4] See App. p. A-38.

On original hearing, the Louisiana Supreme Court, in a seven to zero (7-0) opinion, affirmed the Court of Appeal decision. It there held that the phrase "all mineral rights" is not ambiguous and included lignite. On rehearing, in an opinion in which no majority of the members of the Supreme Court of Louisiana agreed on the reasons for judgment, that Court reversed its original opinion and that of the Court of Appeal. See App. p. A-9 for original opinion and opinion on rehearing.

On December 8, 1981, Petitioners filed a motion to vacate and annul the judgment of the Supreme Court of Louisiana on the grounds that it violated the provisions of the constitutions of Louisiana and the United States. See App. p. A-94. Notice that the motion was not considered by the Supreme Court of Louisiana was filed on January 8, 1982, but two Justices of that Court noted that the motion should have been granted and gave reasons for their opinion. See App. p. A-100 and n. 2, supra.

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[4]Article 40 of the Louisiana Mineral Code (La. R. S. 31:40) reads as follows:

"An interruption of prescription applies to all types of minerals covered by the act creating the servitude and to all modes of its use."

VI.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

A. The Decision Of The Supreme Court Of Louisiana Abrogates Louisiana Law Existing At The Time The Contract Was Made And Impairs Petitioners' Valuable Property Rights Acquired Under The Contract.

Article I, Section 10 of the United States Constitution provides that "No State shall ... pass any ... law impairing the obligation of contracts...." A court decision which operates in the same manner as legislation to destroy valuable property rights gained under a contract is violative of this provision of the Constitution.

When Petitioners sold their land and reserved the minerals in 1956, it is clear they were vested with a real property right at that time. The Louisiana Supreme Court, in response to certification of a question by the United States Supreme Court in *Leiter Minerals, Inc., v. United States*, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957), made the following statements:

> In this state when property is conveyed and the mineral rights are reserved, the party reserving the minerals is vested with a real right, the right to go upon the land and produce the minerals. In such a case the purchaser of the land subject to this servitude does not acquire the mineral rights, the ownership of which is vested in the vendor. As to the minerals, all the purchaser has acquired is the expectancy or hope that the mineral servitude will be extinguished by the 10-year prescription of non-use and will not be extended or continued by

> use beyond this period. Where the minerals have been reserved, the purchaser of the land pays nothing for them and has no vested right in them. As said by this court in Tennant v. Russell, 214 La. 1046, 39 So.2d 726, 728, "A right is *vested* when 'the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. The right must be absolute, complete, and unconditional, independent of a contingency, and a mere expectancy of future benefit, or a contingent interest in property * * * does not constitute a vested right.' 16 C.J.S. Constitutional Law § 215, page 642." See also United States v. Nebo Oil Co., D.C., 90 F.Supp. 73; 5 Cir., 190 F.2d 1003.

Leiter Minerals, Inc. v. California Co., 132 So.2d 845, 854 (La. 1961). Furthermore, it has been held that a valid contract is property. *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934); *North Texas Producers Association v. Young*, 308 F.2d 235 (5th Cir.), cert. denied, 83 S.Ct. 874, 372 U.S. 929, 9 L.Ed.2d 733 (1962).

This Court has said that state action which destroys valuable property rights violates the Contract Clause of the United States Constitution. In *Pennoyer v. McConnaughy*, 140 U.S. 1, 11 S.Ct. 69, 35 L.Ed. 363 (1890) the Court said:

> That legislation surely impaired the obligation of the contract Owen had with the State, for its effect was to destroy valuable property rights and privileges belonging to him. It was therefore violative of the Constituion of the United States. Art. 1, §10.

35 L.Ed. at 371.

Admittedly, the general rule is that the Contract Clause is violated only by a legislative enactment

subsequent to the creation of a contractual obligation. The prohibition ordinarily does not reach judgments by a state court interpreting laws in existence when a contract was made. As a result, errors in the decisions of state courts, even though they impair the obligations of contracts, usually do not give rise to a federal question. *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 32 S. Ct. 577, 56 L. Ed. 924 (1912).

Notwithstanding the general standard, exceptions to the stated rule described in *Cross Lake*, supra, have developed. For example, *Columbia Railway Gas & Electric Co. v. South Carolina*, 261 U. S. 236, 43 S. Ct. 306, 607 L. Ed 629 (1923) and *Terre Haute & Indianapolis Railroad v. Indiana*, 194 U. S. 579, 24 S. Ct. 767, 48 L. Ed. 1124 (1904) stand for the proposition that a state decision may, without specific reliance on a statute, by express implication give effect to a subsequently enacted statute and, thus, violate the Constitution. *Marinello v. Shell Oil Company*, 511 F.2d 853 (3rd Cir. 1975).

Another exception has been recognized in cases in which a changed interpretation of a law, which was in effect at the time the contract was made, alters the rights of parties to a contract. In *Hann v. City of Clinton, Oklahoma*, 131 F.2d 978 (10th Cir. 1942), an Oklahoma law existing at the time of the contract was found to be an essential part of the contract. Likewise, the Tenth Circuit found that it was a settled rule of law in that state and elsewhere that the judicial construction placed on a statute becomes a part of it as far as contractual rights gained thereunder are concerned. Accordingly, a change of interpretation after rights are acquired:

> "is to all intents and purposes the same in its effect as an amendment of the law by means of a legislative enactment." 131 F.2d at 983,

and equally violative of the prohibition against the impairment of contracts.

In this case, Mansfield specifically reserved the mineral servitudes in 1956. For many years before and including 1956, settled Louisiana jurisprudence provided that prescription running against a mineral servitude was interrupted by drilling and/or production of minerals from that servitude. In 1958, the Louisiana Legislature passed Act 332, which reads in pertinent part as follows:

> "In the event a bona fide attempt is made to drill for or produce minerals or in the event that there is actual production, prescription shall be interrupted."

Act 332 was brought forward as La. R. S. 30:112, App. p. A-5, and now is La. R. S. 31:36, App. p. A-6.

As long ago as *Levy v. Crawford, Jenkins and Booth Limited,* 194 La. 757, 194 So. 772 (1940), the Louisiana Supreme Court held that a reservation in a deed of "all of the mineral rights" constituted a single servitude and that "the entire servitude was capable of being kept in force and effect by use on any part of it, so long as not more than ten years elapsed between one use and another."

It is clear, therefore, that Petitioners' proper use of the servitudes reserved unto them the right to exploit all minerals reserved. See e. g., *Lee v. Giaque,* 154 La. 491, 97 So. 669 (1923), *Mays v. Hansboro,* 222 La. 557, 64 So.2d 232 (1953). These valuable property rights vested solidly in Petitioners, yet the Louisiana Supreme Court wrenched them from Petitioners in its decision here.

Notwithstanding that Petitioners used the servitudes according to Louisiana law, the Louisiana

Supreme Court held Petitioners had lost the right to exploit the servitudes for solid minerals. That holding is contrary to law and clearly deprives Petitioners of a valid contractual right and violates the Contract Clause of the Constitution of the United States.

The action of the Louisiana court totally disregards long-standing, substantive law. Not only are the parties to this litigation affected, all other mineral owners in Louisiana who have relied on laws regarding use of their servitudes may now find their servitudes are divisible. Thus under the Louisiana court's holding, such mineral owners will lose their rights to exploit minerals they clearly are entitled to mine.

With respect to the mode of use issue, in 1956 there was no specific Louisiana statute governing the question of mode of use of a mineral servitude, such as now found in La. R. S. 31:40, n. 3, supra, enacted in 1974. Moreover, no Louisiana court had decided the precise issue. Louisiana scholars, nevertheless, had opined that, prior to the 1974 Mineral Code, Louisiana law was no different than reflected in the referenced 1974 statute. Furthermore, they stated that the Louisiana Civil Code articles arguably applicable to the issue should not be applied to mineral servitudes.

In fact, the redactor of La. R. S. 31:40 testified in the trial of this case that he did not intend to change the law when he wrote that legislative act. The official comment to that provision bears him out:

> "Article 796 of the Civil Code provides that the mode of servitude is subject to prescription as well as the servitude itself. Article 40 assures that Article 796 of the Civil Code will not be applicable to mineral servitudes unless parties make some express agreement regarding prescription of mode of use. It is unrealistic and inequitable to provide that after conducting drilling and production operations for an extended period of time a

servitude owner could not then mine the same or different minerals by a different method.

* * *

...The intent of Article 40 is to assure that Article 798 of the Civil Code will not be applied to limit the extent of an interruption by operations for discovery and production of or actual production of one mineral. Additionally, it is intended that use of one particular method of mining would not exclude other forms. Thus, strip mining would not exclude shaft mining or drilling." (Comment, La. R. S. 31:40.)

Just as the statute in *Hann v. City of Clinton*, supra, became an essential part of the contract, the referenced legislation, jurisprudence and rules became a part of the 1956 contract in such a way that the rights created thereby could not be altered by subsequent judicial decisions. Not only had the legislation and jurisprudence become a part of the contract, the accepted Louisiana rule had the force and effect of a legislative enactment. The subsequent disregard and alteration of the legislation and rule by the Louisiana Supreme Court, destroying rights already created, runs afoul of the Contract Clause of the Constitution of the United States.

The decision of the Louisiana Supreme Court, ignoring the cited legislation and accepted logical rule of Louisiana law, that the use of a mineral servitude by one means interrupts prescription for all modes of use, destroys rights acquired under a contract entered years before and violates the provisions of the Constitution. The decision deserves review by this Court to insure the continued inviolability of contractual rights and to protect the interests of all mineral owners in Louisiana.

B. The Judgment Of The Supreme Court of Louisiana Does Not Conform To The Mandate Of The

Louisiana Constitution And Thereby Deprives Petitioners Of Their Property Without Due Process Of Law.

The Louisiana Constitution of 1974, Article 5, Section 3, App. p. A-8, requires that four of the states' seven supreme court justices "must concur to render judgment." This obviously means that a majority of the Louisiana court must agree on any one issue forming the basis of the opinion of which review is sought. That did not happen here.[5]

Petitioners' interest in the contracts they entered in 1956 are clearly property rights. See Section VI A, supra. Petitioners were deprived of their property in a manner inconsistent with the clear language of the Louisiana Constitution. A deprivation accomplished in a manner inconsistent with the hightest law of Louisiana, its constitution, is a denial of due process under both the constitutions of Louisiana and the United States.

The deprivation of vested property rights by the United States has been subject to due process analysis under the Fifth Amendment to the United States Constitution. Our federal courts have said that under the Fifth Amendment, rights incident to the ownership of land cannot be divested by action of the United States without due process of law. *Northern Cheyenne Tribe v. Northern Cheyenne, etc.*, 505 F.2d 268 (9th Cir. 1974); *Southwestern Petroleum Corp. v.*

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[5]Two justices held Mansfield reserved the right to exploit all mineral rights, and that right had been preserved;

Three justices held Mansfield reserved the right to exploit all mineral rights, but the right to exploit lignite had prescribed; and

Two justices held Mansfield did not reserve the right to exploit lignite.

See, also, January 8, 1982, Notice from Supreme Court of Louisiana, App. p. A-100.

Udall, 361 F.2d 650 (10th Cir. 1966). It is equally important that deprivations by judicial decision, rather than by legislation, be required to comply with due process. This is especially true in situations, such as the one presently before the Court, in which the highest court of a state refuses to abide by state constitutional restraints and, as a result, an owner is deprived of his property without due process of the law. See n. 2, supra. If no review of such actions is available in the federal courts, state supreme courts will be free to ignore the mandates of their state and the federal constitution with impunity.

C. The Judgment Of The Supreme Court Of Louisiana Is State Action And Deprives Petitioners Of The Equal Protection Of Law.

The equal protection of the law, guaranteed in the Fourteenth Amendment, also has been denied to Petitioners by the decision of the Louisiana Supreme Court. The equal protection clause is applicable to both civil and criminal cases, since the constitution protects life, liberty and property. *Lee v. Habib*, 424 F.2d 891 (D. C. Cir. 1970). Furthermore, the application of state law by the judiciary, even in a lawsuit between private parties, may constitute state action which must conform to the requirements of the Constitution. *New York Times Co. v. Sullivan*, 376 U. S. 254, 84 S. Ct. 710, 11 L.Ed. 2d 686 (1964); *Edwards v. Habib*, 397 F.2d 687 (D. C. Cir. 1968). This may be so even though the state is enforcing a privately negotiated contract. *Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 92 L.Ed 1161 (1948); *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501 (S. D. N. Y. 1969).

In this case, the Louisiana Supreme Court judgment constituted state action depriving Petitioners of their constitutional right to equal protection of the law.

In contravention of the Louisiana Constitution, no majority concurred in the Court's reasons for judgment. See n. 4, supra. Thus, there has been no clear cut determination of the issues involved in this case. When called upon to consider the issues again, neither a court nor the parties will be bound by the decision reached in this case. See, e. g. *Hertz v. Woodman*, 218 U. S. 205, 30 S. Ct. 621, 54 L.Ed. 1001 (1910), *U. S. v. Pink*, 315 U. S. 203, 62 S. Ct. 552, 86 L.Ed. 796 (1942), and *U. S. v. Friedman*, 528 F.2d 784 (10th Cir. 1976). The only persons whose rights will be determined by the opinion of the Louisiana Court are those involved in this particular case. It is a denial of Petitioners' right to equal protection under the Fourteenth Amendment, as well as the state constitution, to deprive them of their property on the basis of a ruling applicable only to them and binding on no others, when the result purportedly is based on a general interpretation of Louisiana law, but, in fact, the majority of the Louisiana Court did not concur in its findings.

All mineral owners in Louisiana will be uncertain of their rights unless this Court reviews this case and considers the issues raised.

VII.

CONCLUSION

The judgment of the Supreme Court of Louisiana violates Petitioners' rights under the constitutions of the United States and Louisiana. The case is important not only because millions of dollars are involved, but because all mineral owners in Louisiana will be affected by the outcome of this suit. With respect, it is submitted that the case should be reviewed by this Court.

Respectfully submitted,

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February, 1982

Appendix

APPENDIX TO PETITION FOR CERTIORARI

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APPENDIX A

United States Code, Title 28.

§1257(3). State Courts; Appeal; Certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX B

LOUISIANA ACTS

ACT No. 332

Senate Bill No. 160. By: Mr. Cole.

AN ACT

To provide that prescription shall begin to run on a mineral servitude on the day on which the servitude is created and that in the event a bona fide attempt is made to produce minerals, or in the event of actual production, prescription shall be interrupted and shall commence to run again on the last day of actual operations to produce minerals as shown by the records in the office of the Louisiana Department of Conservation; and providing for interruption of prescription by shut-in payments in lieu of production and the commencement of prescription after the term of payment.

Be it enacted by the Legislature of Louisiana:

Section 1. Except as otherwise provided by Section 5806 of Title 9 of the Louisiana Revised Statutes of 1950, prescription shall begin to run on a mineral servitude on the day on which the servitude is created, provided, however, that in the event a bona fide attempt is made to drill for or produce minerals, or in the event that there is actual production, prescription shall be interrupted and shall commence to run again on the last day of production or the last day actual drilling or production operations are conducted on the property, regardless of whether an application to abandon the well shall have been filed with the Louisiana Department of Conservation, or regardless of whether said well shall be actually plugged and abandoned, or in the event of contracts providing for shut-in rental payments in lieu of production, prescription

shall commence to run again at the end of the period for which the last such rental payment was made in the event of no production.

Section 2. This Act shall not apply to oil, gas and other minerals or royalties which have been or are hereafter reserved in acquisitions of land by the United States of America, or any of its subdivisions or agencies, or by the State of Louisiana or any of its subdivisions or agencies, whether such acquisitions of land were or are by conventional deed or contract, condemnation or expropriation proceedings, nor shall this Act apply where land so acquired by the United States of America, or any of its subdivisions or agencies, was or is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas or other minerals or royalties. All such mineral servitudes are imprescribable by virtue of Section 5806 of Title 9 of the Louisiana Revised Statutes of 1950, which Section shall continue to apply in all cases of lands heretofore or hereafter acquired by the United States of America, or any of its subdivisions or agencies; and nothing in this Act shall alter, amend, modify, repeal or in any manner revise the provisions of said Section 5806 of Title 9 of the Louisiana Revised Statutes of 1950.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Approved by the Governor: July 6, 1958.

APPENDIX C

Louisiana Revised Statutes

La R. S. 30:112. See body of Act 332, supra.

APPENDIX D

Louisiana Mineral Code

La. R. S. 31:36

§ 36. Production as interruption of prescription

Prescription of nonuse is interrupted by the production of any mineral covered by the act creating the servitude. The interruption occurs on the date on which actual production begins and prescription commences anew from the date of cessation of actual production.

Acts 1974, No. 50, § 36, eff. Jan. 1, 1975.

La. R. S. 31:40

§ 40. Interruption applicable to all minerals and modes of use

An interruption of prescription applies to all types of minerals covered by the act creating the servitude and to all modes of its use.

Acts 1974, No. 50 § 40, eff. Jan. 1, 1975.

APPENDIX E

Louisiana Civil Code

Art. 796. The mode of servitude is subject to prescription as well as the servitude itself, and in the same manner.

By mode of servitude, in this case, is understood the manner of using the servitude as is prescribed in the title.

Art. 798. If, on the contrary, the owner has enjoyed a right less extensive than is given him by his title, the servitude, whatever be its nature, is reduced to that which is preserved by possession during the time necessary to establish prescription.

APPENDIX F

Constitution of the State of Louisiana of 1974, Article 5

§ 3. Supreme Court; Composition; Judgments; Terms

Section 3. The supreme court shall be composed of a chief justice and six associate justices, four of whom must concur to render judgment. The term of a supreme court judge shall be ten years.

APPENDIX G

Supreme Court of Louisiana

No. 67,188

THE CONTINENTAL GROUP, INC.

VERSUS

J. L. ALLISON, JR., ET AL.

ON WRIT OF CERTIORARI OR REVIEW TO THE COURT OF APPEAL, SECOND CIRCUIT, PARISH OF DeSOTO.

CALOGERO, Justice

In the year 1956 after two years of negotiations Mansfield Hardwood Lumber Company sold for approximately $90.00 per acre, 92,000 acres of timberland in seven parishes in North Louisiana to Robert Gair Co., Inc. predecessors of the Continental Group, Inc. In that sale there was specifically reserved to vendor "all mineral rights" and there was further included a damage clause providing for restitution to the vendee for impairment of his interests incurred in the exercise of such mineral servitude.[1]

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[1]The damage provision reads:

"... The Vendor shall pay the Vendee for all damage done to timber, wood or other forest products or the property of the Vendee on the lands conveyed hereunder ... in connection with operations by the Vendor ... in the course of such exploitation and shall assume the payment of, and pay any taxes levied on all minerals produced from such operations,

An additional 1100 acres of timberland were not sold in 1956 because of title deficiencies, the conveyance to Continental being accomplished later, in 1963, following curative title work. That sale also excluded, or reserved to vendors, "all mineral rights" with a similar damage clause operating in favor of the vendee.

At the time of the sale some 20,000 acres were subject to oil and gas leases. No other minerals were then subject to leases or in production. There were known sand and gravel deposits on some of the acreage, and while lignite, a type of coal,[2] was known to exist on certain acreage, production apparently was not then economically feasible.

Due to worldwide trends in the decade of the 1970's prompted in part by the advent of the OPEC oil cartel, the relatively high cost of extraction of lignite was overcome by the value of that substance in the energy marketplace. Profit from the strip mining of lignite had become feasible.

In 1977 plaintiff Continental sued J. L. Allison, Jr. and several others, former corporate shareholders in Mansfield, and assignees of Mansfield's reserved mineral rights, seeking a declaratory judgment that the servitude created by reservations in the sale in-

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or the increase in the value of the land, if any, caused thereby or by the equipment placed thereon in connection with such exploitation."

[2]Coal is classified by its transformation from moist organic matter through bituminous to the hard, highly sought-after anthracite. Lignite is of the lowest rank of coals, being a brown substance intermediate between peat and bituminous coal. The name is derived from *lignum*, from the Latin for wood, because the texture of the original wood is often discernible in the coal. Encyclopaedia Britannica, Vol. 4, (1974); Helen Hemingway Benton, Pub.

cluded only the right to explore for and exploit oil, gas and kindred minerals and not the right to explore for or strip mine for solid minerals such as lignite.

After exhaustive discovery and protracted trial there was judgment in the district court in favor of plaintiff Continental that the parties to the 1956 sale had not contemplated that lignite coal would be included in the vendor's reservation of "all mineral rights." The trial judge commented that in his opinion the case was close enough to have been decided either way.

The Court of Appeal reversed this decision holding that under the peculiar circumstances of the case, Gair (Continental) and Mansfield (defendants' predecessor) had in fact intended to include in the reservation the right to explore for various substances designated as minerals, including lignite coal.

We granted writs upon the application of Continental which contests the Court of Appeal decision. They complain of the "far reaching consequences" of the decision below.

Two issues are here presented: whether the reservation of "all mineral rights" included the right to explore for lignite coal, and if so, whether the mineral servitude as to lignite had prescribed for ten years non-use on the lands involved in this litigation (some 20,000 acres) notwithstanding production of oil and gas (the latter question posed differently is, does interruption of prescription of a mineral servitude apply to all types of minerals covered by the acts creating the servitude and to all modes of the servitude's use?).

For the reasons so ably stated by the Court of Appeal and for those which follow we hold that the mineral servitude here created included the right to explore for lignite and that oil and gas production on

the 20,000 acres interrupted prescription as to the lignite mineral servitude.

Mansfield specifically and broadly reserved "all mineral rights." Plaintiffs contend that Mansfield and Gair, Continental's predecessor, intended to restrict the reservation to oil and gas. The facts we find, and as found by the Court of Appeal, do not support plaintiffs' position, but just the reverse.

The Court of Appeal exhaustively treats this first factual issue of the contractual intention of the parties; we choose simply to adopt that reasoning. As discussed in the court below, the circumstances preceding and subsequent to the act of sale are indicative of what in fact transpired in the agreement between Mansfield and Gair.

The 1956 act of sale was perfected after two years of extensive negotiations between the parties and took place one year subsequent to an agreement to sell. In negotiating for the sale of these lands, the vendor offered to convey to vendee all of the minerals, or the right to extract all minerals for an additional ten dollars per acre. The vendee declined to accept this offer, and the trial court so found. This decision not to purchase all the minerals is among the strongest indications of the intention of the parties concerning what was reserved and what was intended to be reserved when the parties employed in the contract of sale the language "[t]here is expressly excluded from this sale, and the vendor reserves, all mineral rights in the lands conveyed hereunder ...." Gair's unwillingness to purchase the minerals does not demonstrate, as the trial court decided, an indifference to the ownership of the mineral rights. Rather, it suggests a positive decision on Gair's part to refrain from purchasing the rights to minerals in which they,

by their own admission, had no interest whatever.[3] And it is the opinion of this Court, just as it was suggested to Gair by Mansfield at the time Gair chose not to deal for the minerals, that Gair rightfully be bound to the consequences of their decision and that they be held to have intended to surrender claim to those rights.

An early draft of the agreement to sell prepared by plaintiff provided that the sale would be "... exclusive of mineral rights ..." and that "... there shall be excepted and reserved to the seller in each deed ... all mineral rights." At a point later in the negotiations when Gair's New Orleans counsel attempted to restrict the term "all mineral rights" to exclude the right to extract earth, sand, and gravel, such attempt was met by Mansfield protest and, as a result, the reservation remained unrestricted. While the attempt to restrict the mineral reservation to exclude sand and gravel admittedly says nothing specifically about Gair's intentions concerning other minerals, such as lignite, Mansfield's refusal to limit the servitude indicates that the negotiators for that company were determined to retain, as defendant suggests, the rights to *all* minerals.

Apparently in response to the vendor's refusal to make any exceptions to the broad reservation of "all mineral rights," there was included in the contract of sale the damage clause set forth at footnote one of this opinion. That damage clause is sufficiently broad to encompass all damages to be occasioned by Continental including not only damage to standing timber but

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[3]In brief and in oral argument to this Court, plaintiff has repeatedly urged that at the time of the sale in question, the Robert Gair Company was first and last a lumber company, concerned only with the timber on the surface of the land.

also damage to the vendee's timber growing operations.

We focus here on the intention of the parties because that is ultimately the significant question. It deserves noting however that the language employed in the mineral reservation *is not ambiguous.* The words "all mineral rights" clearly encompass solid minerals such as lignite as well as fugacious minerals such as oil and gas. There is a bit of convolution in plaintiff's position that the words of the reservation properly interpreted excludes solid minerals and that it is therefore incumbent on defendants to prove that the specific intention of the parties was to include the reservation of lignite and/or any other solid minerals.

Plaintiff's approach is not wholly without support but it is not, in our view of *this* case, correct.

In the more usual mineral servitude grant involving landowner and mineral purchaser, broad language has understandably and properly been restricted by the Courts. Consequently there has arisen the principle that the proper interpretation is that which least restricts ownership of the land conveyed [McDuffy v. Weil, 240 La. 758, 125 So.2d 154 (1964)] and the rule of ejusdem generis.[4]

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[4]Black states:

> "In the construction of laws, wills, and other instruments, the 'ejusdem generis rule' is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." [Citations omitted.]

Black's Law Dictionary 608 (4th ed. rev. 1968)

The latter principle has been applied to interpret "iron, coal and other minerals" in one of two deeds (the other having used the words "iron, ore, coal, fire-clay, kaolin, and marl") as not including oil and gas [Huie Hodge Lumber Co. v. Railroad Lands Co. 151 La. 197, 91 So. 676 (La. 1922)]; and to interpret "all the mineral, oil and gas rights" in lands conveyed to a farmer for grazing and agricultural purposes, as not reserving the right to exploit the land for sand and gravel. Holloway Gravel Co. v. McKowen, 200 La. 917, 9 So.2d 228 (1942). And in a recent case involving lignite coal this Court refused writs after the Second Circuit determined that parties who had employed the commonly used Bath form oil, gas and mineral lease had effected a grant to explore for and produce minerals of the same physical properties as oil and gas, and that lignite coal was not included in that grant. River Rouge Minerals, Inc. v. Energy Resources of Minnesota, 331 So.2d 878 (La. App. 2d Cir. 1976).

The case before us, however, on its particular and unusual facts is clearly distinguishable from the foregoing cases. For one thing there were here two large timber companies confecting a not so usual sale of 90,000 acres of timber land for a price (geared to timber value) in excess of six million dollars. They specifically negotiated, incident to the timberland sale, concerning "all minerals" and "all mineral rights." The language they chose to employ in the reservation was "all mineral rights" a term unaccompanied by other terms, unlike the cases cited hereinabove.

We therefore determine that the parties in this case intended what the words chosen clearly express, that the vendor reserved "all mineral rights."

We do not intend, nor envision, this decision as affecting untold mineral leases outstanding in this state. We have simply decided this case on its particular facts.

One of plaintiff's major arguments is that the lignite strip mining process so impairs surface rights that a timber company like Gair would not have purchased these lands had they realized that vendors were reserving the right to strip mine lignite. Thus, it is argued, the parties must have intended to exclude lignite from the reservation, or alternatively, there was no meeting of the minds.[5]

With respect to the degree of impairment of surface rights the assessment by the Court of Appeal is supported by the record.[6] With respect to the contention that Gair would not have purchased the lands had they realized that vendors were reserving the right to strip mine lignite, that, of course is conjectural. The simple fact of the matter, however, is that Gair permitted, or agreed to, vendors' reserving all mineral rights. They are to be held to their contract.

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[5]It should be noted, however, that relator does not attempt to void the sale, only to interpret it provisions contrary to its verbiage.

[6]A part of the Court of Appeal reasoning is as follows:

"In addition to the 93,000 acres acquired from Mansfield and the defendants, Continental owns more than 200,000 acres of timberland in North Louisiana and South Arkansas. From its total 300,000-plus acres, Continental annually harvests timber from non-contiguous tracts on 7,000 to 10,000 acres, sometimes selectively cutting and sometimes clear-cutting. Continental fully reforests (replants) the acres which it clear-cuts. About 1/30 of its total acreage is harvested annually to allow full regrowth in approximately 30 years. Plaintiff's forester testified that plaintiff's harvesting and restoration program could work around a mining plan." The Continental Group, Inc. v. J. L. Allison, Jr., et al., La. App., 379 So.2d 1117 (1979), at p. 1127.

Nor are we impressed with plaintiff's contention that vendors while using unrestricted mineral reservation language did not specifically contemplate or intend the reservation of the right to strip mine lignite; that they cannot be regarded as having contemplated the inclusion of a mineral substance having in 1956 no foreseeable economic value in the absence of an express intention to the contrary. The Court of Appeal response to this contention was:

> "The very word explore — long used with exploit in explaining the nature of the mineral servitude, whether oil and gas or solid minerals — implies a venture into the unknown or uncertain. This is in the nature of a 'hope' which may be sold or reserved. C.C. Art. 2451. The economics of mineral exploration and exploitation have always been uncertain and the fact that a particular mineral has no foreseeable economic value at the time a mineral reservation is made is but one factor to be weighed with other factors in determining what the parties intended. It was a factor in Holloway Gravel. It is a factor here, but to a much lesser extent because these parties bargained and negotiated about the scope of the term all mineral rights and eventually agreed that the term would not be limited, even as to gravel, and that a damage provision would be added to recompense, wholly or in part, the landowner for whatever it might suffer by reason of the exercise of the right of the servitude owner to all minerals." The Continental Group, Inc. v. J. L. Allison, Jr., et al., La. App., 379 So.2d 1117 (1979), at p. 1129.

The Court of Appeal was correct. The reservation of "all mineral rights" in this case included the right to explore for and exploit lignite coal, a solid mineral. And the Court of Appeal was likewise correct in remanding to allow the trial court and the parties to

determine how and to what extent a reasonable exercise of the projected servitude by the strip mining of lignite by the defendants may be permitted by law, citing Delahoussaye v. Landry, 3 La. Ann. 549 (La. 1948), the Louisiana Mineral Code, and La. Civ. Code arts. 772-779.

As already suggested hereinabove the right in vendor's assignees to strip mine for lignite coal is relevant in this litigation only to approximately 20,000 of the 90,000 acres of land conveyed, for it was only as to the 20,000 acres that defendants have preserved *any* mineral interest by their exploration for oil and gas. The mineral servitude as to the remaining acreage has prescribed through non-use, the parties concede.

With respect, however, to the 20,000 acres, plaintiff relators take the position that even if the mineral reservation is found to include the right to explore for lignite coal, that right has prescribed because production of oil and gas did not interrupt the ten year nonuse prescription as relates to lignite.

The present mineral code answers this precise question favorably to defendants.

> "Prescription of nonuse is interrupted by the production of any mineral covered by the act creating the servitude. The interruption occurs on the date on which actual production begins and prescription commences anew from the date of cessation of actual production." R.S. 31:36.
>
> "An interruption of prescription applies to all types of minerals covered by the act creating the servitude and to all modes of its use." R.S. 31:40.

This provision of the mineral code, however, was not applicable until 1975 and this legal issue pre-1975 was not clearly resolved in the jurisprudence.

The Court of Appeal therefore relied on GMB Corp. v. Cox, 340 So.2d 648, (La. App. 2d Cir. 1976) which

held that the mineral code is to be retroactively applied where the particular issue has not been clearly resolved to the contrary by litigation. And in this instance the issue had not been so resolved.

Plaintiff asserts that the Court of Appeal should have but did not determine the applicable law pre-mineral code; that they, plaintiffs, are entitled to such resolution now, for, given their sought for interpretation, and having such interpretation (prescription) apply ten years following reservation of the servitude, they claim a property right which should not be divested by retroactive application of the mineral code.

Without conceding the procedural point, that is, that the Court of Appeal's reliance on Article 214 of the Mineral Code is inappropriate, but rather pretermitting that issue, we nonetheless hold that oil and gas production in this case did interrupt prescription as to the digging of solid minerals, for the reason that such is the preferred interpretation of the law as it was before passage of the Mineral Code.

Continental, in support of its contention that oil and gas production alone did not interrupt prescription of vendor's right to strip mine for lignite, relies upon La. Civ. Code arts. 796-799[7] which generally relate to

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[7]Those Louisiana Civil Code articles, all of which have since been repealed, appeared as follows:

"Art. 796. The mode of servitude is subject to prescription as well as the servitude itself, and in the same manner."

"By mode of servitude, in this case, is understood the manner of using the servitude as is prescribed in the title."

"Art. 797. If he to whom a servitude is due enjoys a right more extensive than that which is given him by the act establishing the servitude, he will be considered as having preserved his right of servitude; because the less is included in the greater.

prescription of a mode of use of a servitude. Article 796 provides that the mode of servitude, which is defined as the *manner* of using it, is subject to prescription just as is the servitude itself, and in the same manner. And Article 798 provides that if the owner has enjoyed a right less extensive than is given him by his title, the servitude, whatever be its nature, is reduced to that which is preserved by possession during the time necessary to establish prescription.

Thus, plaintiff contends that while the drilling for and production of oil and gas has interrupted prescription with respect to the servitude as relates to oil and gas, the failure to strip mine for lignite has caused a loss by prescription of that mode of use of the servitude, that is, the extraction of lignite.

Our answer to that argument is this. The mineral servitude here at issue is a discontinuous servitude which is unlimited by title as to its exercise, whereas articles 796-799 are applicable only to discontinuous servitudes when the title creating same establishes

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"But he can not thus prescribe for the surplus, and can be compelled to confine himself to the exercise of the servitude granted by his title, unless it be a continuous apparent servitude, which he has acquired by prescription."

"Art. 798. If, on the contrary, the owner has enjoyed a right less extensive than is given him by his title, the servitude, whatever be its nature, is reduced to that which is preserved by possession during the time necessary to establish prescription."

"Art. 799. If the owner has merely enjoyed an accessory right, which was necessary to his right of servitude, he will not be considered as having used his right of servitude.

"For example, if he who has the right of drawing water from the well of his neighbor, has passed often through the land of the latter, and gone to the well without drawing water during the time required for prescription, he will have lost his right of drawing water without acquiring that of passage, which was merely accessory to the right of drawing water."

limitations as to the mode of exercise.

As was stated at 33 La. La. Review 169 (1973):

"The redactors of the 1825 Louisiana Code took the passage of Toullier out of context. In context, it is abundantly clear that Toullier speaks of the prescription of the *mode* of exercise of discontinuous servitudes. He did not deal with the different problem of the partial prescription of the area of the servitude by the prescription of non-use. Further, Toullier makes it clear that the prescription of the mode of exercise of the servitude is pertinent only if the *title* of the servitude contains *limitations* as to its mode of exercise. He says that

'if the servitude is not limited by its title ... it is presumed to be unlimited; then the use of the servitude made during the night preserves the right to exercise it during the day, because a single act of exercise of the servitude preserves the whole of it, indefinite and unlimited, as it were: because, according to Article 707 [of the French Civil Code which corresponds with Article 790 of the Louisiana Civil Code of 1970] it is from the last day of enjoyment that the prescription begins to run.'

"Toullier is saying that the question of the prescription of the mode of servitude arises only when there are limitations in the title pertaining to the mode of exercise of the servitude. Article 798 of the Louisiana Civil Code then is applicable *when the title creating a discontinuous servitude establishes limitations as to the mode of exercise,* for example, by night, by day, by carriage, or on foot. If there are no limitations, there is not question of the prescription of the mode of exercise under article 798.

* * *

"Article 656 of the Civil Code establishes the principle that servitudes are indivisible. By virtue of this principle, implicitly adopted in France, and

in other civil law jurisdictions, partial use of a servitude suffices ordinarily to keep the servitude alive as a whole ....

* * *

"Upon conclusion, it is submitted that articles 796-97 of the Civil Code were intended to apply and do apply, to discontinuous servitudes in cases in which the exercise of the servitude is subject to limitations contained in the title. *These articles have no application to continuous servitudes or to discontinuous servitudes in the absence of limitations in the title .... In Louisiana, where the period of non-use is ten short years, there are additional reasons for a balanced interpretation of articles 796-98. It is only such an interpretation that will do justice to the scheme of the Code and to the text of Toullier, the actual source of these provisions.*" (Emphasis Added). "Work of the Louisiana Appellate Courts for the 1971-72 Term." 33 La. L. Rev. 169, 194-196 (1973).

Since the servitudes with which we deal in the case at bar are admittedly discontinuous and without limitation in their title, the Civil Code provisions cited by relators are inapplicable. We therefore determine that the applicable law with respect to this prescription issue and mode of use prior to the mineral code are the same as is now provided by that code at R. S. 31:40, which states: "An interruption of prescription applies to all types of minerals covered by the acts creating the servitude and to all modes of its use."

Decree

Accordingly, the judgment of the Court of Appeal is affirmed and the case remanded to the district court for the further proceedings directed by the Court of Appeal, consistent with the views expressed by this Court.

AFFIRMED; REMANDED TO THE DISTRICT COURT.

X X X

No. 67,188

THE CONTINENTAL GROUP, INC.

VERSUS

J. L. ALLISON, JR., ET AL

ON REHEARING

BLANCHE, Justice. We granted a rehearing in this matter to reconsider our holdings concerning the scope of the mineral reservation and whether the right to search and capture the mineral lignite had prescribed for non-use notwithstanding the production of oil and gas.

Scope of the Mineral Reservation

As to this issue, we concede that the phrase "all mineral rights" is inherently ambiguous and the word "minerals" as defined in its broadest sense, would include anything not animal or vegetable and would even embrace the soil itself. Thus, the Court may examine extrinsic evidence to determine the intent of the parties when making the reservation. Huie Hodge Lumber Co. v. Railroad Lands Co., 151 La. 197, 91 So. 676 (1922).

We have taken cognizance of the reasons of both lower courts on this issue and acknowledge, as did the trial court, that the issue is a close one. Nevertheless, we prefer the exhaustive analysis made by the court of

appeal concerning the contract negotiations leading to the reservation as determinative of the issue, and adopt that court's analysis of the evidence that the reservation of "all mineral rights" included the right to explore for and exploit lignite coal, a solid material.

At the risk of being redundant we adopt their conclusion on this issue as follows:

Dixon, C. J. concurs w/reasons.

Calogero, J. dissents. The opinion correctly resolves the all mineral rights issue but incorrectly decides the prescription issue. I subscribe to the opinion on original hearing.

Dennis, J. concurs w/reasons.

Lemmon, J. concurs and will assign reasons.

Watson, J., dissents, being of the view that the original opinion was correct.

> "Mansfield and Continental negotiated about the broadness of the term *all mineral rights.* Continental wanted to restrict the term to exclude earth, sand and gravel. Mansfield wanted to keep it unrestricted.
>
> "The digging of earth, sand and gravel certainly was contemplated as being included in the term *all mineral rights.* Lignite and other solid minerals are not excluded and the digging of lignite must be deemed to have been within the contemplation of the parties." The Continental Group, Inc. v. J. L. Allison, Jr., et al, 379 So.2d 1117 (2nd Cir. 1979), at p. 1130.

The Prescription Issue

Plaintiff's success on the scope of the reservation issue is short-lived, for we now reverse our earlier position on the prescription issue and find that the plaintiff's right to search for and capture lignite had prescribed for ten years' non-use notwithstanding the production of oil and gas.

By way of review, we note that the court of appeal based its finding on the case of GMB Gas Corp. v. Koch, 340 So.2d 638 (2nd Cir. 1976), which directed that the provisions of the Mineral Code should be followed on pre-code issues which have not been clearly resolved by the jurisprudence. Believing the matter had not been clearly resolved, they applied R.S. 31:40, which provides, "An interruption of prescription applies to all types of minerals covered by the act creating the servitude and to all modes of its use." Clearly, under this provision, the production of oil and gas would suffice to interrupt prescription for the strip-mining of lignite.

We were correct in not applying R.S. 31:40 retroactively as did the court of appeal, for the prior law was not the same[1] and since the effective date of the

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[1]Defendants rely heavily on the testimony of George W. Hardy III, who said R.S. 31:40 did not change prior law. Such a definite position has not always been espoused by him, as he wrote in 32 La. L.Rev. 557 (1972):

> "Mode of Use — One of the lingering doubts concerning the law applicable to mineral servitudes, and perhaps mineral royalties as well, concerns the possible application of those articles of the Civil Code which contemplate that predial servitudes may be reduced by a use less extensive than that granted by the original title and those which provide that certain modes of use of servitudes may prescribe."

Furthermore, the official comments to R.S. 31:40 clearly reflect that the authors of the new article feared the use of the prior law, as they said:

> "Article 796 of the Civil Code provides that the mode of servitude is subject to prescription as well as the servitude itself. Article 40 assures that article 796 of the Civil Code will not be applicable to mineral servitudes unless parties made some express agreement regarding prescription of mode of use ...
>
> "Article 798 of the Civil Code provides that if a servitude is used less extensively than the right given in the title creating it, the servitude is reduced to that which is pre-

Mineral Code was January 1, 1975, by that time, whatever rights plaintiff had were vested. As the Mineral Code itself provides:

> "The provisions of this article shall apply to all mineral rights, including those existing on the effective date hereof; but no provision may apply to divest already vested rights, or to impair the obligation of contracts." R.S. 31:214.

Concerning the court of appeal's application of the logic as expressed in GMB Gas Corp., supra, we respond by quoting the following excerpt from 38 La. L.Rev. 378 (1978):

> "An inquiry into the meaning of the old law should be guided by article 1 of the Civil Code, which states 'Law is a solemn expression of the legislative will.' Therefore, in seeking to ascertain whether new law has destroyed rights under old law, courts must do more than merely examine whether there is a four-square case in point. Rights long established under the Civil Code or legislation are often so clearly vested that there is no need for controversy or litigation. Legislation, as much as any case, can vest rights. Therefor, future decisions ought to analyze Civil Code regimes antedating the Mineral Code, irrespective of jurisprudence or the absence thereof."

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served by possession during the prescriptive period. This article has not been applied to a mineral servitude except in the case of Ohio Oil Co. v. Ferguson, 213 La. 183, 34 So.2d 746 (1948), in which the servitude owner sold to another all of his rights in a specified portion of the servitude tract. However, the question of the applicability of this article where only one mineral has been produced during the prescriptive period has not been raised in the jurisprudence. The intent of article 40 is to assure that article 798 of the Civil Code will not be applied to limit the extent of an interruption by operations for discovery and production of or actual production of one mineral."

Thus, as we did in our original opinion, we look to the pertinent articles of the Civil Code that were in effect when the servitude was made in 1956, and when the right to strip-mine for lignite under said servitude prescribed in 1966. Those articles are C.C. art. 796 and art. 798.[2]

> "Article 796. The mode of servitude is subject to prescription as well as the servitude itself, and in the same manner.
>
> "By mode of servitude, in this case, is understood the manner of using the servitude as is prescribed in the title."

* * *

> "Article 798. If, on the contrary, the owner has enjoyed a right less extensive than is given him by his title, the servitude, whatever be its nature, is reduced to that which is preserved by possession during the time necessary to establish prescription."

In our original opinion while addressing the prescription issue, we were incorrect in holding that these articles were inapplicable. We held that the mineral servitude here at issue is a discontinuous servitude which is unlimited by title as to its exercise, whereas Articles 796-799 are applicable only to discontinuous servitudes when the title creating same establishes limitations as to the mode of exercise. We then concluded that the preferred interpretation of the law as it was before passage of the Mineral Code was that oil and gas production would interrupt prescription as to

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[2]Both C.C. art. 796 and art. 798 were repealed effective January 1, 1978 by Acts 1977, No. 514.

For the sources of articles 796-798, see: **Louisiana Legal Archives, Project of the Civil Code of 1825**, p. 91 (1937); **Domat**, Part I, Book I, Tit. 12, Sec. 6, No. 5; **Toullier**, Vol. 3, no. 700.

the digging of solid minerals. We now find this conclusion was erroneous.

In previous cases, this Court and our lower courts have used these articles to decide mineral right controversies. As we said in Trunkline Gas Co., et al v. Steen, et al, 249 La. 520, 187 So.2d 720 (1966):

> "In the evolution of the mineral law in the State, it was recognized that the sale or reservation of a mineral right, having been classed as a servitude, was subject to the applicable articles of the Civil Code in the resolution of conflicting claims; and in deciding the early and landmark case of Ohio Oil Co. v. Ferguson, supra, the precedent upon which succeeding decisions, including Childs v. Washington, supra, and Jumonville Pipe and Machinery Co. v. Federal Land Bank, supra, were predicated, we concluded the articles of the Civil Code in Title IV, entitled "Of Predial Servitudes or Servitudes of Land", whenever applicable were controlling."

The landmark case referred to, Ohio Oil Co. v. Ferguson, et al, 213 La. 183, 34 So.2d 746 (1946) used the Civil Code in determining a mineral owner's rights. There it was found that the servitude owner had enjoyed a right less extensive than that which was given him by his title and, hence, the servitude was reduced to that which was preserved by his use or possession during the time necessary to establish prescription. The case cited articles 798 and 803. In the present case, we have a similar situation. The defendant had the right by title to all minerals (including lignite); however, he only enjoyed that right to produce oil and gas. Hence, his mineral servitude should be reduced to oil and gas.

Admittedly, there are no cases exactly on point with the issue at hand. However, prior jurisprudence con-

cerning the preservation of servitudes by use provides us with the simple proposition that if you don't use it, you lose it, and if you don't use it well enough, you lose it. While this is probably an oversimplification of the issue, the following cases reflect this position when dealing with mineral servitude cases.

Louisiana Petroleum Co. v. Broussard, et al, 172 La. 613, 135 So. 1 (1935) is an example of not exercising the servitude in the proper manner so as to interrupt prescription. The servitude in question gave unto the grantees a right to search for oil and gas. The grantees, although exploiting for oil and gas, stopped or abandoned their effort at a depth at which there was no reasonable hope of discovering minerals in paying quantities. In concluding that the grantees had lost their servitude, the court held:

> "To use a servitude, so as to interrupt prescription, is to use it in the manner contemplated by the grant or reservation. This ruling finds support in articles 796 to 800, inclusive of the Civil Code, touching the mode of use of servitudes and in connection therewith, prescription. The servitude, in this instance, was granted for the purpose of exploring for oil, gas, and other minerals, and converting them to possession, if they were discovered, and the servitude existed for that purpose. Reference must therefore be made to the object of the grant — not for the purpose of determining whether there has been a breach of any obligation that might exist to develop, but to determine whether there has been such use as to interrupt prescription."

In Goldsmith v. McCoy, et al, 190 La. 320, 182 So. 519 (1938), the court followed Broussard, supra, and held that a geophysical exploration for the purpose of determining by scientific methods the indication of minerals underlying the surface was not use of the servitude in the manner contemplated by the grant

thereof and, accordingly, such activity did not interrupt prescription.

Analogous to this situation are the cases involving pipelines and the prescription of the right to lay them more than ten years after the construction of the first line. In the expropriation case of Columbia Gulf Transmission Co. v. Fontenot, 187 So.2d 455 (3rd Cir. 1966), that court held the transmission company's failure to construct any additional lines during a ten year period constituted a use less extensive than that given it by its title, and consequently, the transmission company lost by prescription any rights it had under the agreements to construct additional lines. The court cited articles 796 and 798. Using this logic in Dickerson v. R.J.M. Pipeliners, Inc., et al, 331 So.2d 501 (2nd Cir. 1976), another circuit found the defendants had not used their right to lay additional gas transmission lines on plaintiff's property; thus, their right had prescribed. Both cases are examples of the use of C.C. arts. 796 and 798 and our simplification of their reading that if you don't use the servitude you lose it. Such was the situation with our immediate case.

These cases are but examples of the use of the Civil Code articles in dealing with mineral servitudes and like situations regarding their prescription for non-use. We now find that, since the right to explore and capture lignite was not used, the defendant's mineral servitude to strip-mine for lignite expired in 1966. Since that time, the plaintiff, as landowner, has been in possession of this prescribed right.

We base this conclusion on the fact that absolutely no mode of use even vaguely resembling strip-mining was performed by the defendants during their ten year prescriptive period. Since the mode of servitude is subject to prescription as well as the servitude itself

(art. 796), we find the right to strip-mine for lignite has prescribed. Furthermore, since the defendants enjoyed the right by title to "all mineral rights" and only drilled for oil and gas, their servitude is reduced to that which they preserved (art. 798).

For the above reasons, the decisions of the Second Circuit Court of Appeal and this court on original hearing are reversed. Plaintiff's request for a declaratory judgment limiting defendant's servitude to the right to explore for and exploit oil, gas and kindred minerals is granted. The right to explore for and strip-mine for the solid mineral lignite is granted to the plaintiff. All costs of these proceedings are to be paid by the defendants.

REVERSED.

* * *

No. 67188

THE CONTINENTAL GROUP, INC.

Versus

J. L. ALLISON, JR. et al.

DIXON, Chief Justice (concurring)

I respectfully concur. Although "all mineral rights" is all-inclusive, it is not ambiguous, in my view. The difference, however, does not affect the outcome of this case. Further, I concur in holding that, before the effective date of the Mineral Code, C.C. 796 and 798 provided that prescription running against the servitude may be interrupted only in the manner used "as is prescribed in the title."

NO. 67,188

THE CONTINENTAL GROUP, INC.

VERSUS

J. L. ALLISON, JR., ET AL.

ON REHEARING

DENNIS, Justice, concurring.

I respectfully concur in the result.

Although I endorsed the majority's position regarding the scope of the mineral reservation upon original hearing, I am now convinced that the approach taken in determination of the parties' intent was an unwarranted departure from sound principles of contractual construction. Abandonment of the precepts generally utilized in the past will have an unsettling effect on the law of immovable property in this state. I am unwilling to again embrace the approach on rehearing, although I concur in the result and the decree.

The 1956 reservation of "all mineral rights" was said not to be ambiguous on original hearing. The majority on rehearing recognizes that the phrase is inherently ambiguous. I agree. I disagree with the manner in which the majority resolves that ambiguity.

In interpreting contracts we are guided by Louisiana Civil Code articles 1945-62 comprising the chapter entitled "Of the Interpretation of Agreements." Article 1959 provides:

> "However general be the terms in which a contract is couched, it extends only to the things concerning which it appears that the parties intended to contract."

While the objective of the court should be to determine the actual subjective intent of the parties, nevertheless the very fact that the parties used general or indefinite language is indicative of the fact that the parties probably did not, at the time of their agreement, have a specific understanding as to exactly what their contract was intended to comprehend.

It is undisputed that lignite deposits in North Louisiana were not commercially exploitable at the time this servitude was created. It is unrealistic and unreasonable to assume that the parties intended that the use and utility of the surface of the property, critical to the needs of the landowner, could be destroyed if at some future time it should become economically feasible to mine a mineral not presently commercially exploitable absent a clear and affirmative expression to that effect. This court has frequently arrived at a narrow construction of broadly-worded mineral reservations in part by reliance on this commercial exploitability notion. E.g., Holloway Gravel Co., Inc. v. McKowen, 200 La. 917, 9 So.2d 228 (1942); Huie Hodge Lumber Co. v. Railroad Lands Co., 151 La. 197, 91 So. 676 (1922). See also, River Rouge Minerals, Inc. v. Energy Resources of Minnesota, 331 So.2d 878 (La. App. 2d Cir. 1976). Cf. Delahoussaye v. Landry, 3 La. Ann. 549 (1848).

It is unreasonable to believe that parties, because of the size of their legal staffs or the length of their negotiations, must have intended the servitude in question to include the right to strip mine lignite when that mineral did not become commercially exploitable until decades later due to unforeseeable economic and political upheavals. It would be more realistic for this court to presume that parties which use general and indefinite terms in their agreements are contemplating the inclusion of only those minerals which are commercially exploitable at that point in time.

This is not to say that parties who foresee that a natural resource may one day become commercially exploitable cannot specifically contract for the right to search for and produce that resource. Rather, it is my contention that this court should not provide mineral lessees with a windfall merely because the parties utilize the inherently ambiguous phrase "all mineral rights" in their contracts. Mineral contracts which are not utilized in a reasonable manner for the exploration of and production from servient estates, should not be allowed to remain as charges upon the land for purely speculative purposes.

Narrowly construing ambiguous mineral reservations is also consistent with the general civilian principle of resolving doubt in favor of the free use and alienability of immovable property. McGuffy v. Weill, 240 La. 758, 125 So.2d 154, 158 (1960); Domat, Les lois civiles dans leur ordre naturel, 1 Oeuvres de Domat 329 (ed. Remy 1828); 2 Toullier, Droit civil francais 192 (1833). Civil Code article 730 clearly states (as did article 753 before it) that: "Doubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate." It is a cardinal rule of interpretation that, in case of doubt, instruments purporting to establish predial servitudes are always interpreted in favor of the owner of the property to be affected. La. C.C. art. 730, Comment (b). This court has repeatedly declared that "servitudes are restraints on the free disposal and use of property, and are not, on that account, entitled to be viewed with favor by the law. Parish v. Municipality No. 2, 8 La.Ann. 145, 147 (1853), cited with approval in Buras Ice Factory, Inc. v. Department of Highways, 235 La. 158, 103 So.2d 74 (1958).

On this admittedly close issue of the scope of the mineral reservation, the majority has declined to

follow the sound and established principles of construction because of the "particular and unusual facts" in this case. On original hearing this court stated that it did not intend or envision its decision to have great import in other contexts and cases. I cannot agree that the impact of the decision will be so limited. Rather, it seems to me that in areas with lignite mining potential, the scope of each mineral reservation or conveyance now may be decided only after exhaustive case by case examinations of the parties' negotiations in an effort to divine their intentions on a subject that they probably never thought about. Such an approach can only lead to confusion, instability and ultimately to a less efficient, more costly development of this state's lignite deposits.

* * *

APPENDIX H

Supreme Court of Louisiana

NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE #106

FROM: Clerk of Supreme Court of Louisiana

On the 9th day of October, 1981, the following action was taken by the Supreme Court of Louisiana, composed of Chief Justice John A. Dixon, Jr., and Associate Justices Pascal F. Calogero, Jr., Walter F. Marcus, Jr., James L. Dennis, Fred A. Blanche, Jr., Jack Crozier Watson, and Harry T. Lemmon, in the cases listed below:

REHEARINGS DENIED:

67,188	The Continental Group v. Allison CALOGERO, J., would grant a rehearing. DENNIS, J., concurs in the denial for reasons expressed in his concurring opinion. WATSON, J., would grant a rehearing. LEMMON, J., concurs for reasons expressed by Dennis, J.
80-KA-2236	State v. Jerome Hudson See Per Curiam MARCUS J., concurs in the denial. LEMMON, J., concurs in the denial.
80-KA-2773 C/W	State v. Wayne D. Hennigan LEMMON, J., concurs in the denial.
80-KA-2775	State v. Guy Clement, Jr. LEMMON, J., concurs in the denial.

80-KA-2363	State v. Jon F. Hogan LEMMON, J., concurs with reasons.
80-KA-2804	State v. Sermon
80-KA-2849	State v. Joseph Alpine
80-KA-2873	State v. Edward Charles Morris CALOGERO, DENNIS & LEMMON, JJ., would grant a rehearing.
81-C-0140	In the Matter of the Succession of Ted F. Dunham, Sr. (Two Applications) MARCUS, J., would grant both applications.
81-KA-0198	State v. Thomas Poree CALOGERO, J., would grant a rehearing.
81-KA-0201	State v. Whitt
81-C-0415	Jackson, et ux v. American Insurance Co., et al LEMMON, J., would grant a rehearing.
81-C-0531	Terrebonne Parish Police Jury v. Carroll Matherne DIXON, C.J., would grant a rehearing.
81-C-0552	Succession of Melissa Mary Raiford LEMMON, J., would grant a rehearing.

APPENDIX I

JUDGMENT RENDERED October 30, 1979.
Application for rehearing may be filed within the delay allowed by Art. 2166, LSA-CCP.

NO. 13,961

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * * *

The Continental Group, Inc., *Plaintiff-Appellee*

versus

J. L. Allison, Jr., et al, *Defendants-Appellants*

* * * * * *

Appealed from the
Eleventh Judicial District Court for the
Parish of DeSoto, Louisiana

Honorable Jack E. Burgess, Judge

* * * * * *

WIENER, WEISS, MADISON & HOWELL By: John M. Madison, Jr., James F. Howell and James R. Madison	Attorneys for Defendants-Appellants, J. L. Allison, Jr., et al
WILKINSON, CARMODY & PEATROSS By: W. Scott Wilkinson	Attorneys for Defendant-Appellant, W. Scott Wilkinson

W. T. PEGUES	Curator ad Hoc for Absent Defendants-Appellants
BLANCHARD, WALKER, O'QUIN & ROBERTS By: Robert Roberts, III, Joseph W. Milner and Randall S. Davidson	Attorneys for Plaintiff-Appellee
WRIGHT, JAMES, HOGG & BLEICH By: Howard W. Wright, Jr.	Attorneys for Plaintiff-Appellee
COLVIN, HUNTER, BROWN, PLUMMER & MEANS By: D. Scott Brown	Attorneys for Plaintiff-Appellee

* * * * * *

Before PRICE, MARVIN and JONES, JJ.

MARVIN, J.

In this appeal of a declaratory judgment, we reverse the trial court and hold that under the peculiar circumstances of this case, a reservation of *all mineral rights* made in a sale of more than 90,000 acres in 1956 is to be construed as including solid minerals and as allowing defendants, who are successors in title to the reserving vendor, to strip-mine deposits of lignite coal under the lands.[1] We remand, however, to allow the

[1]The reservation language reads:

"There is expressly excluded from this sale, and the Vendor reserves, all mineral rights in the lands conveyed hereunder ... with the right of ingress and egress for the proper exploitation of the same. The Vendor ... shall pay the Vendee for all damage done to timber, wood or other forest products or the property

trial court and the parties to determine how and to what extent a reasonable exercise of the servitude may be permitted by law. *Delahoussaye v. Landry,* 3 La. Ann. 549 (La. 1848); La. Mineral Code; CC Arts. 772-779.

The predecessors in title of the litigants were producers of timber and manufacturers of timber products. The plaintiff corporation, as successor to the vendee in the 1956 sale, sought a declaration that each servitude created by the reservation on the several non-contiguous tracts comprising the 90,000 acres included only the right to explore for and exploit *oil, gas and kindred minerals* and did not include the right to strip-mine solid minerals.

The lower court did not make the declaration that plaintiff prayed for, but declared that the parties to the 1956 sale did not intend that the language of the reservation would include lignite or give defendants the right to strip-mine. In accord with a stipulation by the litigants the lower court also held that as to the non-contiguous tracts upon which nothing had occurred to interrupt the 10-year non-use prescription, several of the servitudes had expired as to all minerals. This part of the judgment is not complained of. Defendants contend that the servitudes on some tracts[2] have not prescribed because oil or gas production had prevented prescription from accruing and

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of the Vendee on the lands conveyed hereunder ... in connection with operations by the Vendor ... in the course of such exploitation and shall assume the payment of, and pay any taxes levied on all minerals produced from such operations, or the increase in the value of the land, if any, caused thereby or by the equipment placed thereon in connection with such exploitation."

[2]Drilling or production operations for oil and gas have occurred on about 26 separate tracts totalling about 20,000 acres.

that defendants are entitled to strip-mine the lignite. Plaintiff contends that oil and gas operations do not prevent accrual of liberative prescription as to solid minerals which may be recovered only by digging them from the ground.

In written reasons for judgment, the lower court stated that this case reasonably could have been decided either way and applied the rule of CC Art. 753 as expressed in *Whitehall Oil Company, Inc. v. Heard*, 197 So.2d 672 (La. App. 3d Cir. 1967), writ refused:

> "Ultimately we concluded that, where the instrument could as reasonably be interpreted either way, the proper interpretation is that which least restricts the ownership of the land conveyed, as in the case of mineral servitudes (citations omitted). In so concluding we rely on the legislative mandate that 'Servitudes which tend to affect the free use of property, in case of doubt as to their extent or the manner of using them are always interpreted in favor of the owner of the property to be affected.' LSA - Civil Code Art. 753. See McGuffey v. Weil, 240 La. 758, 125 So.2d 154."

In *Huie Hodge Lumber Co. v. Railroads Land Co.*, 151 La. 197, 91 So. 676 (1922), a reservation of the *iron, coal and other minerals* was held to embrace only solid minerals and not to include oil and gas.

Huie Hodge observed:

> "*** Terms are to be understood in their plain, ordinary and popular sense, unless they have acquired a particular technical sense by the known usage of the trade. They are to be construed with reference to their commercial and their scientific import. This rule is of special importance when the question arises whether a specific mineral is included."
>
> 91 So. at p. 678
> See also CC Arts. 1946-1962.

Conversely in *Holloway Gravel Co. v. McKowen*, 200 La. 917, 9 So.2d 228 (1942), a reservation of all the *mineral, oil and gas* rights was held not to include sand or gravel or the right to strip-mine. It was there said:

> "'The term mineral' is not a definite one, capable of a definition of universal application, but is susceptible of limitation according to the intention of the parties using it, and in determining its meaning regard must be had, not only to the language of the deed in which it occurs, but also to the relative positions of the parties interested, and to the substance of the transaction which the deed embodies."
>
> 9 So.2d at 231

Holloway Gravel noted La. C.C. Art. 1959:

> "However general be the terms in which a contract is couched, it extends only to the things concerning which it appears that the parties intended to contract."

and La. C.C. Art. 1958:

> "But if the doubt or obscurity arise for the want of necessary explanation which one of the parties ought to have given, or from any other negligence or fault of his, the construction most favorable to the other party shall be adopted, whether he be obligor or obligee."

Equally applicable, even retroactively where the Civil Code is silent or where the particular issue has not been squarely decided to the contrary, are the provisions of our recently adopted Mineral Code (LRS 31:1 et seq., Act 50 of 1974). See *GMB Gas Corp. v. Cox*, 340 So.2d 638 (La. App. 2d Cir. 1976). The rule of ejusdem generis, although not solely decisive, was applied in *Huie Hodge* (iron, coal and other minerals) and in *Holloway Gravel* (all the mineral, oil and gas rights) because in each case the term *minerals* was accompanied by other terms. See also *River Rouge Min., Inc.*

v. Energy Resources of Minn., 331 So.2d 878 (La. App. 2d Cir. 1976), writ refused. The rule of ejusdem generis, however, here is of indirect assistance only because no terms accompany or qualify the eventual reservation *all mineral rights.* The purchaser, however, unsuccessfully attempted to restrict this term in earlier negotiations.

The trial court correctly allowed the introduction of evidence, testimonial and documentary, bearing on the question of the intent of the parties in 1956. *Holloway Gravel Co.*, supra. We shall summarize this evidence and shall state why our conclusions differ from those of the lower court.

CIRCUMSTANCES BEFORE AND AFTER THE SALE ON MAY 25, 1956

An agreement to sell was signed by the parties on September 29, 1955. This agreement resulted from negotiations which began in late 1954 and involved about 93,000 acres at $95 per acre. Examination of title revealed some defects requiring curative work in about 1,100 acres. About 92,000 acres were sold in the May 25, 1956 sale by separate deeds of that date and of later dates. The 1,100 acres were the subject of a sale which occurred between the parties in 1963 after title defects had been cured. The seller was Mansfield Hardwood Lumber Company. We shall refer to the buyer sometimes as Continental.

Mansfield negotiated through its officers, A. S. Johnson, T. W. M. Long and Brown McCullough, and was represented by a Shreveport lawyer (Cook), now deceased. McCullough is also deceased. Johnson and Long testified.

Continental's negotiations were made primarily through Fitts, one of its officers and directors, and to

a much lesser degree by Dykes, its president. A New York law firm (Newhall) and a New Orleans law firm (Milling) represented Continental. Two members of Newhall's firm, Oechler and Roberts, assisted Newhall to a slight degree. A member of Milling's law firm, Miller, provided some slight assistance to Milling. Dyke, Roberts, Oechler and Miller testified by depositions. The others are deceased. Some, but not all, of the writings pertaining to the sale were available and were introduced as evidence. Other writings were lost or destroyed.

An early draft of an agreement to sell was apparently drafted by or for Continental and was presented to Mansfield's Shreveport attorney in New York. This early draft, dated July 12, 1955, provided that the sale was to be "exclusive of mineral rights" and that "there shall be excepted and reserved to seller in each deed ... all mineral rights."

A letter from Newhall to Dyke, dated July 13, 1955, states that Mansfield's lawyer

> "... did not want to read the contract this morning. He left LaGuardia on the ... plane for Shreveport and plans to examine the draft contract on his way down there and then talk with his clients."

This draft and Dyke's letter indicate that the term *all mineral rights* originated with Continental and not with Mansfield. The term began to acquire a more definite meaning within a few weeks.

On August 12, 1955, Milling forwarded to Cook a draft of the proposed act of sale which included this language:

> "There is expressly excluded from this sale, and the vendors reserve, all mineral rights in the lands conveyed hereunder and all mineral rights, if any, that vendor may own in and to the lands above

described which are affected by said leasehold instruments. The expression 'mineral rights' does not include earth, sand and gravel."

In a letter of August 15, 1955 from Oechler in New York to Miller in New Orleans, there is enclosed a suggested revision of the draft of the agreement to sell which had been changed in part by Cook and in part by Oechler. The letter reads:

"One of these [changes made by Cook], granting rights of ingress and egress for mineral rights excepted from the sale, I shall wish to discuss with you more fully. The other, pertaining to trustee's fees, is satisfactory."

Cook's revision uses this language:

"There shall be excepted and reserved to seller in each deed and assignment all mineral rights, with the right of ingress and egress for the proper exploitation of the same."

On August 19, 1955 Oechler wrote Cook:

"I enclose herewith two copies of the revised Mansfield-[Continental] contract and of the revised act of sale and special mortgage ... You will note that I have put the mineral rights in the form in which we should like them * * *"

One of Oechler's changes was the addition of this paragraph:

"Notwithstanding any provision of this contract to the contrary, it is understood that this is a sale of timber lands and leasehold interests therein; therefore, if the descriptions contained in the schedules attached should cover any mill site or mill yard, or should include any town lots or houses thereon, they are not intended to be included herein."

This draft also contained the statement that Continental

"represents that it has dealt with no one other than Messrs. Johnson, McCullough and Long in

connection with the transaction ..."

In the draft of the act of sale enclosed with this letter, the pertinent Oechner (Milling) language read:

> "There is expressly excluded from this sale, and the vendor reserves, all mineral rights ... with the right of ingress and egress for the proper exploitation of the same. *The expression 'mineral rights' does not include earth, sand and gravel.*" [Emphasis supplied.]

Cook and Oechler apparently discussed the fact that Mansfield would not agree that earth, sand and gravel would be excepted from the expression "mineral rights". Within a few days Continental obviously agreed that this exception would not be made if a damage provision was included. On August 23, 1955, Oechler wrote Cook in part:

> "Pursuant to our telephone conversation today as to mineral rights, I would suggest that the last sentence of the first double spaced paragraph on page 3 in my draft of 8/19/55 be deleted [the sentence italicized and quoted above: *The expression 'mineral rights' does not include earth, sand and gravel.]* and that the following be added to such paragraph:
>
> 'The vendor, or its lessees, shall pay the vendee for all damage done to the timber, wood or other forest products or the property of the vendee on the lands conveyed hereunder and the lands above described which are affected by said leasehold instruments, in connection with the operations by the vendor or its lessee in the course of such exploitation and shall assume the payment of, and pay any taxes levied on all minerals due from such operations, or the increase in the value of the land, if any, caused thereby, or by the equipment placed thereon in connection with such exploitation.'
>
> "The foregoing language is based on the clause that appears in the sample form of lease that was

furnished to Mr. Fitts by his clients."

Bracketed material supplied

Oechler apparently raised the question with Milling about the 10-year prescription for non-use as affecting a reservation of earth, sand and gravel. Milling wrote Oechler on August 26, 1955, referring to telephone conversations, that a reservation of sand and gravel would, in his opinion, constitute a servitude which would be prescribed by 10-years non-user. Milling in this letter discusses, among other cases, *Huie Hodge Lumber Co.* Milling was an attorney for the landowner in *Holloway Gravel.* In this letter Milling stated:

> "In talking with you yesterday, I suggested that if [Continental] is to specifically recognize a reservation of sand and gravel rights, that you consider including a specific paragraph dealing with such rights, to make it clear that the rights are only for commercial production and further, insofar as is possible, to establish a different servitude with respect to sand and gravel from the servitudes established with respect to the minerals. The language I suggested is the following:
>
> > 'Vendor also reserves the right to exploit for commercial production of sand and gravel, all deposits of sand and gravel in the lands conveyed hereunder and reserves such rights, if any, that the vendor may own to exploit for commercial production of sand and gravel, deposits of sand and gravel in the lands above described which are affected by said leasehold instruments with the right of ingress and egress for the proper exploitation of same.'
>
> "If that clause were put in the deed, then, correspondingly, the parenthetical language in lines 4 and 5 of paragraph 1 on page 4 of the agreement should be deleted and the following substituted:

> 'and exclusive also of the right to commercially exploit sand and gravel deposits,'
>
> "and the parenthetical language in the last line on page 4 should be deleted and there should be substituted therefor:
>
> 'and also the right to commercially exploit sand and gravel deposits,'
>
> "If the language which would exclude sand and gravel from the definition of 'mineral' is deleted and no other clause inserted, thus leaving the language as originally drafted, would it be possible, in the light of the way things have developed, to go on record that [Continental] does not concede that the term 'mineral' does not include sand and gravel?"

After the 1956 sale Mansfield was dissolved and its remaining assets, including the minerals reserved in the sale, were conveyed to its stockholders and their assignees. In the events leading up to the 1963 sale some of the former stockholders or assignees were represented by a Shreveport attorney, Woods. Negotiations with Continental were conducted primarily by Long, a former officer of Mansfield, and by Woods. Negotiations for Continental were handled primarily by Boutwell, Continental's district woodlands manager. In a letter to Boutwell dated October 9, 1962, Long wrote:

> "This is to advise you that I have contacted ... Johnson and ... Woods, and it is agreed that we will meet with you at your office ... October 17 ...
>
> "... it is understood by your company that this offer does not include any of the minerals connected with said lands."

On February 28, 1963, in a letter to Woods and Long, Boutwell wrote:

> "Pursuant to my previous conversation with both of you I have now been authorized to offer ...

"This offer is subject to the following conditions:

"1. The vendors shall retain all oil and gas mineral rights that are owned by them under the said property."

On March 7, 1973 Long wrote to Johnson with a copy to Woods and Boutwell:

"This is to advise that ... I called Sam Boutwell ... with Continental ... and told Sam it was ... Woods' and my understanding when we held our discussion ... that the mineral reservations would be exactly the same as the mineral reservations made in the sale ... in 1956.

"Sam said this was correct and ... is ... writing a letter to ... Woods and me advising that the restrictive phrase 'oil and gas' should be eliminated from his letter offering to purchase the ... property."

On March 7, 1963, Boutwell, confirming Long's understanding, wrote to Woods and Long:

"Pursuant to our telephone conversation and general agreement ... we wish to revise the wording of paragraph one of our letter to you dated February 28, 1963 by striking out the words 'oil and gas' thereby agreeing for the Mansfield stockholders to reserve all minerals in this pending transaction."

The 1963 reservation and damage provision eventually read exactly as the 1956 reservation and damage provision which is quoted in footnote one of this opinion.

The trial court found that Continental declined to accept Mansfield's offer in 1955-56 to "sell" the minerals with the land for the reduced price of $10 per acre and that Continental failed to "make any issue over the mineral reservation." On the basis of these findings and the testimony of Continental's forester,

who before the sale was employed by Mansfield, the trial court concluded that neither Continental nor Mansfield was greatly concerned with the question of who owned the minerals because as a practical matter the minerals would revert to the landowner and that any oil and gas production would not present any great problem to forestry operations. We can agree that Continental declined Mansfield's offer to sell the land free of the mineral servitude (if one was made), but we cannot agree that these parties were not concerned with the reservation of *all mineral rights*, what the term included or excluded, and how the minerals would be exploited.

Even if we ignore the testimony of Long that Mansfield expressed, however facetiously, to Continental its concern about digging platinum, gold, rubies and diamonds out of the lands, the documentary evidence summarized above compels the conclusions that Mansfield and Continental negotiated as to whether the term *all mineral rights* would be restricted by other terms.

We conclude that as negotiations progressed, Mansfield and Continental considered the term *all mineral rights* to include more than oil, gas and kindred minerals. Continental recognized the broad and general scope of the term and attempted to have "earth, sand and gravel" excepted. Mansfield sought to avoid even this exception and sought to have expressly recognized its ingress and egress rights for the *proper exploitation* of all minerals. The essence of the documentary evidence pertaining to the term *all mineral rights* establishes that Continental was negotiating to limit the obvious broad and general scope of the term while Mansfield was negotiating to maintain its broad and general scope. The damage provision was added by Continental and agreed to by Mansfield as recompense for Continental's agreeing

not to restrict or limit the term. All of the documentary evidence which was created primarily in 1955-56 at an inauspicious time, more than 20 years before this suit was filed, leads to the conclusion that Continental and Mansfield were "concerned", in different ways, of course, about the broadness of the term, contrary to what the lower court concluded.

The lower court also concluded that the language of the reservation was prepared by Mansfield and that all doubts arising from its language should be construed in favor of Continental. Again we cannot agree, because the evidence clearly establishes that the language finally employed was the product of negotiations — give and take — by both parties. It would not be wrong to conclude, however, that the language of the damage provision was solely the product of Continental.

In its brief, Continental states that the testimony of its geological expert demonstrates:

> "... that the parties to the 1956 mineral reservation could not have intended to include every substance that at some indefinite future time or under some future circumstances might be classified as a 'mineral,' because under the broadest definition of that term, all products taken from the earth are 'minerals,' and these would include such materials as rock, sand, stone, gravel and even the earth itself ..."

THE REAL ISSUE

As Continental thereafter suggests, the real issue is *not* whether lignite is a mineral in the broad sense, but whether these parties intended that the servitude created in the 1956 sale would allow the strip mining of a solid mineral which had no economic significance until some 20 years later.

Continental's argument is concisely stated and emphasized in its brief:

> "**TO SUGGEST, ... THAT 93,000 ACRES OF WOODLANDS, BOUGHT FOR THE EXPRESS PURPOSE OF SUPPLYING A PAPER MILL, COULD AT ANY TIME AND FROM TIME TO TIME IN THE INDEFINITE FUTURE, BE STRIPPED OF THE TREES AT THE WHIM OF A MINERAL OWNER FOR WHATEVER SOLID MINERAL OR OTHER SUBSTANCE IT MIGHT PROVE DESIRABLE TO MINE, WOULD HAVE BEEN TOTALLY BEYOND THE COMPREHENSION, INTENT AND KNOWLEDGE OF THE PARTIES.** To recognize such a right would permit a mineral owner to preserve his rights by laying bare the land from time to time to recover not only lignite, which happens to be the solid mineral substance now of interest (notwithstanding its complete lack of economic significance at the time this trade was made), *but also from time to time, as the market might dictate, whatever other mineral-type substances might become worth producing.* These would include (under defendants' view of the case, at least) sand, gravel, soil, earth, clay, bentonite, iron ore, uranium, rock, stone and heaven knows what else." [Emphasis theirs]

The trial court concluded that:

> "... had the purchaser known ... that *every acre* of the timberlands acquired ... would be subject to strip-mining, ... it would not have made the purchase.
>
> "If such a *severe servitude* had even been slightly alluded to, [it is not] ... reasonable that anyone in his right mind would have gone through with the purchase, knowing that he would be *severely handicapped* in the growth of timber, the very object of his purchase ...
>
> "I am convinced ... that the parties did not contemplate that the servitude would be *so extensive and burdensome* so as to practically destroy the

use of the land by he owner ..." (Emphasis supplied.)

As we noted in *River Rouge,* supra, and as the expert testimony here establishes, strip-mining completely eliminates the surface owner's enjoyment of the portion of the property being mined. The material between the surface and the vein of lignite (25-200 feet in depth), called overburden, must be entirely removed by powerful machines before extracting and transporting the lignite.

In *Holloway,* supra, the court was construing in 1942, a reservation of *all of the mineral, oil and gas rights* made in a 1934 deed to McKowen, a farmer who purchased certain acreage along Thompson's Creek for agricultural and grazing purposes. The amount of acreage was not shown in the opinion. The court noted

—that sand and gravel operations had been conducted several miles north of McKowen's property for several years but that no operations had been conducted in the vicinity of McKowen's property before the 1934 sale;

—that McKowen and his vendors specifically discussed only the reservation of oil and gas rights; and

—that photographic and other evidence revealed that the landowner would suffer a most onerous burden with attendant destruction of the surface and deprivation of the use of the land if the mining of gravel were allowed under the particular reservation.

The court stated that "any operation ... for sand and gravel purposes would result in the utter destruction of its surface ... [and] would greatly impair, if not utterly destroy, McKowen's rights ..." that were intended to be protected by a "clause" in the deed which read:

> "... the vendors ... shall always exercise and have due regard for the rights of the purchaser ... as owner of the land."[3]

The court also noted that the reservation was prepared by the vendor and that doubt or obscurity in its meaning would be resolved most favorably to the vendee CC 1958. Other factors mentioned in *Holloway Gravel* were that the vendee, McKowen, did not consider that the land had any value whatsoever for sand and gravel purposes, that after he acquired the land he attempted to sell the property for an insignificant sum to the husband of his niece, and that the vendor did not make a claim to the proceeds from the sand and gravel operation by McKowen's lessee, which began in 1938, until two years later, in 1940. The court also commented that it would not take issue with the trial judge's conclusion that the parties would have specifically discussed sand and gravel in their negotiations if they had considered the sand and gravel to have *potential value.*

The lower court's conclusions and the argument of Continental generally tracks and parrots the language of *River Rouge* and of *Holloway Gravel Co.,* both cited supra. This case presents much different circumstances. The lower court and Continental also fail to mention our statement in *River Rouge,* 331 So.2d at p. 881, that the digging of gravel is also strip mining, although of a lesser degree than the digging of lignite coal. Expert testimony here further elaborates on the strip mining and restoration process.

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[3] 9 So.2d at p. 233. We note the similarity of this clause with LRS 31:11, which reads:

> "The owner of land burdened by a mineral right and the owner of a mineral right must exercise their respective rights with reasonable regard for those of the other."

The topsoil is first removed by scrapers. A large dragline then removes the overburden (clay, sand, and other matter) down to the depth of the vein. The lignite vein is then fractured and mechanical shovels at the bottom of the pit load it for transportation to the facility using it as fuel. While this process is going on, bulldozers smooth the piles of overburden away from the mining operation to allow farm machinery to prepare for the replanting of flora. Some of the once removed top soil may then be distributed over the smoothed overburden in the ideal restoration process. Restoration has been accomplished with reasonable success in East Texas on lands not grossly dissimilar from North Louisiana lands. In any event, the opinion evidence conflicts as to the degree of restoration possible and the time necessary to achieve maximum restoration. We construe the evidence to the effect that substantial restoration, approaching, but perhaps not reaching, 100 percent of former timber productivity, is possible within 40 years. In one area on the West Coast of the U.S. with abundant rainfall and ideal conditions, it was recited that on the spoils of an old strip mine a paper company planted pine trees which grew 30 inches in one year.

Gravel is strip-mined in the same way and with the same machinery as lignite, at relatively shallow depths, although in most instances much larger and more powerful, but similar, machinery is employed in strip-mining lignite at great depths. It was also shown that the machinery available for this purpose now was available in 1956, although some of the much larger machinery was not then available. The customary method by which gravel was dug in 1956 was by strip-mining, also called open-pit mining.

We have summarized and quoted from documentary evidence which was compiled during the negotiations of these parties, primarily in 1955-56. When Continen-

tal's exception to the term *all mineral rights* (this expression shall not include earth, sand and gravel) was deleted and the damage provision was added, the conclusion is inescapable that the parties intended that solid material could be extracted by the open-pit or strip-mining process from beneath the surface of the lands in the exploitation of the servitude. Continental, by seeking to exclude gravel from the term *all minerals,* cannot contend in this case that gravel is not a mineral and that issue is not before us. Likewise, the issue of the interpretation of the damage provision is not now before us.

Other factors support the conclusion that these parties intended that the term *all mineral rights* and the damage provision contemplated the digging of solid substances from the ground by processes known at the time the servitude was created.

We noted in *River Rouge* some of the history and the character of lignite in DeSoto Parish. Some of the expert witnesses in *River Rouge* offered testimony here. We are also indebted to our learned and articulate brother below for his historical summary.

Before the second decade of this century early pioneers in DeSoto Parish were aware of several outcroppings of lignite in the Dolet Hills (Townships 11 and 12 North, Ranges 11 and 12 West) about 10 miles southeasterly of Mansfield, comprising an area of about 12 miles square. Although some effort was made around the turn of the century to use lignite as a fuel, these efforts were impractical and of no economic value.[4] Interest in the lignite deposits became dor-

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[4]This observation was made in a concurring opinion in 1920:

"It appears from the record that J.M. Nabors has long been a strong believer in the mineral wealth of DeSoto Parish. He had during many years preceding the transactions (in 1911) out of which this suit has arisen, devoted no little time and

mant when oil and gas production became abundant in Louisiana but revived in the 1970s when domestic production of oil and gas substantially failed to meet the nation's need for energy. The geological pamphlet *Louisiana Lignite,* published by the Louisiana Department of Conservation in 1942, reproduced surveys, etc. which showed in some detail the extent, depth and thickness of the lignite vein(s) in the area. Later exploration, but after 1956, supplied more detail, showing that veins of lignite 1-12 feet thick underly approximately 14,000 acres, approximately 10,500 of which were the subject of the 1956 sale and reservation at issue here. The lignite vein averages 5-6 feet thick.

In the data reproduced in the *Louisiana Lignite* publication in 1942, seven borings on plaintiff's lands in the Dolet Hills area revealed veins of lignite at these depths and thicknesses:

LOCATION	DEPTH	THICKNESS
Sec. 5-11-11	59'	9'
5-11-11	28'	12'
8-11-11	98'	9'
8-11-11	77'	8'
9-11-11	55'	1'
16-11-11	45'	7'
1-11-12	143'	4'

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money in various efforts to develop it, by the organization of companies and the employment of experts. Through his instrumentality, coal had been actually mined and a carload sent to St. Louis (to the Exposition ...)"

Frost-Johnson Lumber Co. v. Nabors Oil & Gas Co., et al, 149 La. 100, 88 So. 723 at 729 (1920)
Parenthetical material added

Four visible outcroppings were noted in the 1942 publication:

LOCATION	DEPTH	THICKNESS
Sec. 3-11-11	170'	6'
7-11-11	170'	8'
2-11-12	210'	10'
1-11-12	207'	9'

Plaintiff itself has contracted with an electric utility company to strip-mine the lignite. This utility apparently plans to construct a 640 megawatt generating plant which will use lignite as a fuel. The facility will operate at about 60 percent of its maximum capacity. This operation will require the actual digging of about 60 acres per year but strip-mining will disturb 300-500 acres in moving the overburden from atop the lignite vein and in transporting the lignite. The surface acre disturbance will vary with the quantity of lignite in the vein (thickness and width) and with the depth of the vein below the surface. We deduce that no more than 1,000 surface acres will be disturbed in any one year for the operation in which plaintiff desires to participate.

In addition to the 93,000 acres acquired from Mansfield and the defendants, Continental owns more than 200,000 acres of timberland in North Louisiana and South Arkansas. From its total 300,000-plus acres, Continental annually harvests timber from noncontiguous tracts on 7,000 to 10,000 acres, sometimes selectively cutting and sometimes clear-cutting. Continental fully reforests (replants) the acres which it clear-cuts. About 1/30 of its total acreage is harvested annually to allow full regrowth in approximately 30 years. Plaintiff's forester testified that plaintiff's harvesting and restoration program could work around a mining plan.

Continental argues in this respect that it is irrele-

vant what it does with its lands as a landowner, whether it devotes its efforts to pine plantations or to exploiting the lignite, more than 20 years after the 1956 sale, and that this is of no concern to defendants or to the court. We agree with this argument as a general proposition, but believe this is one of many factors for us to consider in determining whether the recognition of defendants' rights to strip-mine the lignite would be *utterly destructive, unreasonably onerous or burdensome* of Continental's rights as landowner and would allow the *stripping of trees* from 93,000 acres of woodlands at the whim of the mineral owner, as Continental contends and as the trial court erroneously concluded.

In other states where the strip-mining issue has arisen, several approaches have been taken. Texas, for instance, has a firm rule that mineral substances which can be extracted only by strip-mining belong to the surface owner and not to the mineral owner and that the mineral owner may not strip-mine unless the mineral grant expressly provides for the right to strip-mine. See *Reed v. Wylie,* 554 SW2d 169 (Tex. Sp. Ct. 1977). About 10 other states follow a similar rule, even when the mineral grant or reservation expressly includes the substance in dispute. See *Rochez Brothers, Inc. v. Duricka,* 97 A.2d 825 (Pa. Sp. Ct. 1953). We are grateful to plaintiff's counsel for categorizing the several factors and for citing the many cases from other jurisdictions. The common thread in all of the cases, including Louisiana, is entwined around the intent of the parties at the time the grant was made, determined by one or more factors, the obviously sound policy of not allowing the strip-mining process to utterly destroy or completely ravage the lands subject to the servitude.

As plaintiff observes, the principles of Louisiana law, particularly as expressed in *River Rouge* and

Holloway Gravel Co. are generally consistent with the result produced in the cases in other states. The Louisiana principles are generally codified in our Mineral Code, which is applicable to all forms of minerals, oil and gas, and the right to explore for or mine and remove from land, the soil itself, gravel, or other substances occurring naturally in or as a part of geological formations underlying the land. LRS 31:4. Ownership of land includes all minerals occurring naturally in a solid state. §5. A landowner may reserve his right to explore and develop his land for production of minerals. §15. This right is a mineral servitude which is *the right of enjoyment of land belonging to another* for the purpose of exploring for and producing minerals. §21. It must be exercised reasonably and with the obligation to restore the surface to its original condition at the earliest reasonable time (§22), and with reasonable regard for the rights of the landowner whose land is burdened with a mineral servitude. §11. The respective rights of the landowner and the mineral owner are correlative. §11. See *Comment* following, citing and discussing CC Arts. 777, 778, and 779. See also CC Arts. 772, 774. CC Art. 774 reads in pertinent part:

> "The owner of the ... servitude ... has the right to go on the estate which owes the servitude ... where it is necessary to construct ... works necessary for the exercise of the servitude, to deposit there the materials necessary for those works and the rubbish made thereby, under the obligation of causing the least possible damage and of removing them [the materials and the rubbish] as soon as possible.
>
> "Nevertheless, if in the act establishing the servitude, it is said that the owner to whom it has been granted can not construct works in order to exercise it, or can only construct them in a certain manner, this agreement must be observed."

In *River Rouge*, we were construing a particular Bath Form *oil, gas and mineral lease* of common usage in Louisiana to determine whether that instrument granted the lessee the right to strip mine lignite. Our determination was made from the intent of the parties as revealed by or inferred from the instrument itself. Ejusdem generis was applied. We held that lease granted only the right to explore for and produce minerals of the same physical properties as oil and gas (oil, gas and all other minerals), i.e., those minerals that are produced in liquid or gaseous form by drilling wells into the sub-surface.

Similarly, *Holloway Gravel Co.*, in 1942, held a reservation of all of the *mineral, oil and gas rights* did not include the right to dig or strip-mine gravel. The parties specifically discussed only the reservation of oil and gas, not gravel. Ejusdem generis was applied. The court considered both the purpose for which the purchaser bought the land and the effect of the exercise of the servitude on the land (greatly impair, utterly destroy the landowner's rights).

Here the parties dealt with 92,000 acres, about 1/100 of which, at the most, may be affected each year. Mansfield's rights to explore for and produce gravel were expressly negotiated (as in *Holloway Gravel Co., specifically discussed*) when the reservation was made. The only known way to produce gravel in 1956 was the way in which gravel and lignite coal is now produced, by the open-pit or strip-mining process, where the overburden is removed to allow extraction of the material beneath the surface. It was contemplated that any exercise or exploitation of the mineral servitude might cause some damage to timber or other property of Continental on the lands conveyed. We are not called on at this juncture to decide what damages might be recoverable under the damage provision or what strip-mining operations

would or would not be reasonable or permissible under the law. We are called on, however, and do decide that where the parties specifically discuss in 1955 whether the exploitation of gravel is allowed under a reservation of all mineral rights and delete language excluding gravel and add a damage provision, the right to exploit or strip-mine lignite in 1977 in a manner similar to the exploitation or strip-mining of gravel is included within the reservation, provided, of course, that the servitude has not prescribed and its exercise does not otherwise violate law or policy under the law.

Our mineral law sprang from the application of the Civil Code directly or by analogy to issues in cases involving minerals. LRS 31:3, Comment. A reservation of mineral rights is not a reservation of so many tons of coal or barrels of oil, but a reservation of the right to explore for and exploit for any mineral included in the reservation. Such a reservation is not void because of lack of certainty as to the thing reserved or because of violation of any public policy. *Frost-Johnson Lumber Co. v. Salling's Heirs,* 150 La. 756, 91 So. 207, 242 (1922). LRS 31:21. Plaintiff argues that parties to a broadly worded mineral sale or reservation should not be regarded as having contemplated the inclusion of a mineral substance having no foreseeable economic value [*potential value* as in *Holloway Gravel*] at the time of the reservation in the absence of an express intention to the contrary. We cannot agree. The very word *explore* — long used with *exploit* in explaining the nature of the mineral servitude, whether oil and gas or solid minerals — implies a venture into the unknown or uncertain. This is in the nature of a "hope" which may be sold or reserved. CC Art. 2451. The economics of mineral exploration and exploitation have always been uncertain and the fact that a particular mineral has no foreseeable economic value at the time a mineral reservation is made is but one fac-

tor to be weighed with other factors in determining what the parties intended. It was *a* factor in *Holloway Gravel.* It is a factor here, but to a much lesser extent because these parties bargained and negotiated about the scope of the term *all mineral rights* and eventually agreed that the term would not be limited, even as to gravel, and that a damage provision would be added to recompense, wholly or in part, the landowner for whatever it might suffer by reason of the exercise of the right of the servitude owner to all minerals.

In *Delahoussaye v. Landry,* 3 La. Ann. 549 (La. 1848), defendant owned a servitude which allowed him to take wood from the lands of plaintiff. The servitude was created in 1809 and was not then onerous because the plaintiff's lands could support the servitude without deterioration. Some 20 years later defendant converted his farming operations from cotton to the production and making of sugar. The court found that the quantity of wood necessary for the manufacture of sugar could not have been in the reasonable contemplation of the parties at the time of the making of the 1809 contract, that the need for wood for sugar production had increased the burden on the landowner, might increase more, so that what was originally within the province of the parties might become a devastation and destroy the value of the burdened estate. The trial court restricted the defendant to the taking of a maximum of 35 cords of wood per year from plaintiff's property, which was deemed to be sufficient for defendant's operations, excluding the manufacture of sugar. The Supreme Court reversed and remanded:

> "The subject is one of great importance in this portion of the State particularly, and we feel great reluctance in determining it without further lights. We shall leave the extent of this servitude, as to the quantity of wood and what wood is to be

> taken, open for further enquiry, and change the judgment appealed from in that particular. The parties themselves may perhaps render a further examination of this subject by a court unnecessary."
>
> 3 La. Ann. at p. 551

The *Delahoussaye* approach and result is certainly in accord with today's law and policy, as it has evolved since 1848, with regard to the correlative rights and obligations of the landowner and servitude owner. Mineral Code, Arts. 11, 21, 22.

Other factors bearing on the intent of the parties in 1955-56 have been considered, but we do not weigh them as heavily as does plaintiff. One factor is that in a petition for an income tax ruling in 1956 in connection with its liquidation, Mansfield referred to its remaining assets as including *oil and gas mineral rights.* Another factor is the absence in the minutes or corporate internal records of Continental of any reference to lignite or strip-mining and the repeated use of terms supporting its intentions for expanding its timber production and manufacturing operations. Another factor is that defendants never sought to deal with the solid minerals and that on about six occasions Continental dug or allowed the digging of sand or gravel or similar material. Continental donated sand to a country club and sold iron ore (road base material) to public bodies or to contractors doing public works. Defendants denied any knowledge of these activities and plaintiff's witness who testified about the activities, stated that to his knowledge Continental had not notified defendants about the activities and that there was no way for the shareholders to know of this unless they had gone on the land. The fact that Toledo Bend Lake inundated some 15,000 acres of plaintiff's lands without action by defendants, is also not persuasive.

We have considered these and all other factors bearing upon the intent of the parties. Our conclusion, summarized here, is not changed:

Mansfield and Continental negotiated about the broadness of the term *all mineral rights.* Continental wanted to restrict the term to exclude earth, sand and gravel. Mansfield wanted to keep it unrestricted.

The digging of earth, sand and gravel certainly was contemplated as being included in the term *all mineral rights.* Lignite and other solid minerals are not excluded and the digging of lignite must be deemed to have been within the contemplation of the parties.

Recognition that the servitude includes such things as lignite does not permit the servitude owners to exercise their rights arbitrarily or devastatingly or without due regard for the rights of the landowner, but in a reasonable way and in accord with law.

These conclusions, however, raise the issue of whether oil and gas operations on some tracts of the 90,000 acres affected by the servitude have interrupted prescription as against the digging of coal.

> "Prescription of nonuse is interrupted by the production of any mineral covered by the act creating the servitude. The interruption occurs on the date on which actual production begins and prescription commences anew from the date of cessation of actual production."
>
> LRS 31:36

> "An interruption of prescription applies to all types of minerals covered by the act creating the servitude and to all modes of its use."
>
> LRS 31:40

We have held that the Mineral Code is to be retroactively applied where the particular issue has not been clearly resolved to the contrary by litigation. §3, *GMB Gas Corp. v. Cox,* supra, at p. 640. The prescription

issue here was not clearly resolved before adoption of the Mineral Code. Scholarly expert witnesses dispute in this record what the law was on this issue before the Mineral Code. We follow the above authorities and hold oil and gas operations have here interrupted prescription as to the digging of solid minerals.

As to those lands upon which the parties have stipulated that nothing has occurred to interrupt prescription, which lands are described in the judgment, we agree that prescription has not been interrupted. That portion of the judgment is affirmed.

DECREE

As to those lands upon which oil and gas operations have interrupted prescription, described in Appendix A to this opinion, we reverse the lower court and declare and decree that the servitude created in the reservation-damage provision quoted in footnote one of this opinion is a right of enjoyment of the lands described for the purpose of exploring for and producing minerals, in solid, liquid or gaseous form, and whether produced by drilling, mining or digging, including strip-mining, but in a manner contemplated by law.

In order that a determination might be made of whether the projected exercise of the servitude by the strip-mining of lignite by the servitude owners will be in accord with law, this case is remanded for further proceedings.

Costs here and below are assessed one-half to plaintiff and one-half to defendants.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX A

Lands upon which prescription has been interrupted:

DESOTO PARISH

(1) Township 10 North, Range 11 West

Section 3 - E/2 of NW/4, W/2 of NE/4

Township 11 North, Range 11 West

Section 34 - SW/4 of SE/4, SW/4

(2) Township 10 North, Range 11 West

Section 4 - W/2 of W/2
Section 5 - E/2 of Section
Section 9 - NW/4 of NW/4, S/2 of NW/4, NW/4 of NE/4, S/2 of NE/4, S/2 less SE/4 of SE/4

Township 11 North, Range 11 West

Section 32 - SE/4
Section 33 - W/2 of SW/4, SW/4 of NW/4

(3) Township 11 North, Range 11 West

Section 2 - NW/4, W/2 of SW/4, NE/4 of SW/4 less and except that part lying North and East of meander of the Lake
Section 3 - N/2, SE/4, E/2 of SW/4
Section 4 - N/2 less 2 acres in SE/4 of NE/4 owned by DeSoto Parish School Board and described as commencing 14 chains North and 13 chains West of Northeast corner of SE/4 of Section 4-11N-11W, running thence North 5 chains, thence West 4 chains, thence South 5 chains, thence East 4 chains to the place of beginning

Township 12 North, Range 11 West

Section 33 - SW/4 of SE/4, SW/4
Section 34 - S/2 less N/2 of N/2 of SW/4 sold to C. W. Smith

(4) Township 11 North, Range 11 West

Section 5 - NW/4 of NW/4

(5) Township 11 North, Range 11 West

Section 6 - SW/4 of SE/4

(6) Township 11 North, Range 11 West

Section 8 - Fractional E/2 of SW/4 being that part lying South of the Dolet Grant
Section 16 - S/2 of SW/4 of NW/4, SW/4
Section 17 - NW/4, W/2 of NE/4, SE/4, N/2 of SW/4
Section 18 - S/2 of SW/4
Section 19 - NW/4, W/2 of NE/4, SE/4 of NE/4, N/2 of SE/4, SW/4 of SE/4, E/2 of SW/4
Section 20 - S/2 of NW/4, W/2 of NE/4, N/2 of SE/4, N/2 of SW/4

Township 11 North, Range 12 West

Section 24 - NE/4 of NE/4

(7) Township 11 North, Range 11 West

Section 11 - That portion of SW/4 in Fieldwide Unit CHLK RENSU dated 7-18-72

(8) Township 11 North, Range 11 West

Section 15 - E/2 of SW/4

(9) Township 11 North, Range 12 West

Section 1 - S/2 of NW/4, S/2 of SE/4, SW/4 less 1 acre sold to Grove Hill Baptist Church by deed dated May 5, 1947, described as: Beginning at SW corner of Section 1-11N-12W, running East 110 yards,

thence North 68 yards to public road, thence in SW direction along South side of said road to a point 25 yards North of SW corner of Section, thence South along Section line 25 yards to place of beginning

Section 2 - NE/4

Section 12 - Lot 6, being Lots 1 and 3 inside Dolet Grant, and fractional E/2 of NW/4 inside Dolet Grant

(10) Township 12 North, Range 11 West

Section 3 - Fractional W/2 of SE/4 of Section 3 excepting 10.45 acres of said fractional W/2 of SE/4 of Section 3 lying along the West bank of Bayou Pierre, said 10.45 acre strip reserved to follow the meanderings of said Bayou Pierre, in such fashion that the width of said strip East and West shall be the same throughout the length thereof; NE/4 of SW/4, W/2 of SW/4

Section 4 - N/2 of SE/4, SE/4 of SE/4

Section 9 - S/2 of NE/4

Section 10 - W/2 of W/2

(11) Township 12 North, Range 11 West

Section 7 - SE/4 of NE/4

(12) Township 12 North, Range 11 West

Section 20 - S/2 of NE/4, NE/4 of SE/4

Section 21 - SW/4 of NW/4, N/2 of S/2

(13) Township 12 North, Range 11 West

Section 30 - S/2 of SW/4, NW/4 of SW/4

Section 31 - N/2 of NW/4

Township 12 North, Range 12 West

Section 25 - SE/4
Section 35 - N/2, SW/4
Section 36 - NW/4, W/2 of NE/4

(14) Township 12 North, Range 12 West

An undivided three-fourths (3/4) interest in:
Section 1 - South 3/4 of SW/4 of SW/4
Section 11 - NE/4 of NE/4
Section 12 - NW/4 of NW/4

(15) Township 12 North, Range 12 West

Section 3 - SE/4 of NW/4, NW/4 of NE/4, N/2 of SW/4 of NE/4 less and except one acre described as beginning at SE corner of N/2 of SW/4 of NE/4, thence run West 140 yards, thence North 35 yards, thence East 140 yards, thence South 35 yards to beginning; N/2 of SW/4

NATCHITOCHES PARISH

(16) Township 11 North, Range 6 West

Section 26 - W/2 of SW/4

SABINE PARISH

(17) Township 6 North, Range 10 West

Section 4 - An undivided 22.75/115 interest in: W/2 of NE/4, NW/4, N/2 of SW/4, SE/4 of SW/4, and SW/4 of SE/4

(18) Township 6 North, Range 10 West

Section 19 - N/2 of NE/4

(19) Township 6 North, Range 12 West

Section 2 - That part of NW/4 lying South of LaNana Bayou, W/2 of NE/4 lying South of LaNana Bayou, S/2 of SE/4 of

NE/4, S/2 of Section, all of the above located in Lot No. 3 of the LaNana Grant

Section 11 - All of Section 11, less and except a tract beginning at a point 10 feet East of the SE corner of W/2 of SE/4 of SW/4, thence running North 20 degrees West a distance of 400 feet to the South boundary line of Many-Pendleton Ferry Highway, thence in a Southwesterly direction along the South side of said highway as the highway meanders to the intersection of the South line of the above described 20 acres, thence due East a distance of 650 feet to point of beginning, containing 2.75 acres, more or less, all of the above located in Lot No. 3 of the LaNana Grant

(20) Township 6 North, Range 13 West

Section 12 - S/2 of SE/4 lying outside of LaNana Grant

Section 13 - E/2 of NE/4

(21) Township 7 North, Range 10 West

Section 28 - S/2 of N/2, and 1-1/2 acres in SE corner of NW/4 of NE/4, N/2 of SE/4, SW/4 of Section

(22) Township 7 North, Range 10 West

Section 32 - An undivided 22.75/115 interest in: NW/4 of SE/4, S/2 of SE/4, SE/4 of SW/4

(23) Township 9 North, Range 12 West

Section 21 - SE/4 of Section

Section 22 - E/2 of W/2, N/2 of NE/4

Section 27 - W/2 of Section, NE/4 of Section
Section 28 - NE/4 of Section, S/2 of SE/4
Section 34 - NW/4 of Section, W/2 of SW/4

WINN PARISH

(24) Township 12 North, Range 3 West

Section 15 - S/2 of S/2, NE/4 of SW/4
Section 16 - All of Section except W/2 of SE/4
Section 17 - NE/4 of SE/4
Section 22 - NE/4 of NW/4 less 10 acres in SW corner, SE/4 of NW/4, W/2 of NE/4, NE/4 of NE/4

(25) Township 12 North, Range 3 West

Section 6 - W/2 of NW/4, NE/4 of NW/4
Section 19 - W/2 of E/2, S/2 of SW/4, NW/4 of SW/4
Section 30 - NW/4 of NW/4

Township 12 North, Range 4 West

Section 1 - NE/4, E/2 of SE/4, NW/4 of SE/4, W/2 of SW/4, NE/4 of SW/4
Section 2 - SW/4 of NE/4, W/2 of SE/4, SE/4 of SW/4
Section 3 - W/2 of NW/4, NE/4 of NE/4, N/2 of SE/4 of NE/4, SW/4 of NE/4, S/2 of S/2 of NW/4 of NE/4, S/2 of Section
Section 4 - W/2 of Section, SE/4
Section 5 - N/2 of Section, SE/4, E/2 of SW/4
Section 8 - E/2 of NE/4, SE/4
Section 9 - E/2 of Section, SW/4
Section 10 - E/2 of Section, N/2 of SW/4
Section 11 - E/2 of Section, SW/4
Section 12 - W/2 of NW/4, NE/4 of NW/4, all that part of SW/4 lying East of Big Creek
Section 13 - All that part of the NW/4 of NW/4 lying West of Big Creek
Section 14 - W/2 of NW/4, N/2 of NE/4 of NW/4,

SE/4 of NW/4, N/2 of NE/4, SW/4 of NE/4, W/2 of SE/4, SW/4
Section 15 - SW/4 of NW/4, E/2 of NW/4, NE/4, SW/4
Section 22 - E/2 of NW/4, NE/4
Section 23 - N/2 of Section, N/2 of SE/4
Section 24 - NW/4, S/2 of Section
Section 25 - NW/4 of NW/4, N/2 of NE/4
Section 26 - NE/4 of NE/4

Township 13 North, Range 4 West

Section 19 - S/2 of NE/4 of SE/4, SE/4 of SE/4
Section 20 - SW/4 of SE/4, SW/4
Section 28 - W/2 of SW/4
Section 29 - W/2 of Section, SW/4 of NE/4
Section 30 - E/2 of Section
Section 31 - NE/4 of SE/4
Section 32 - N/2 of NW/4, SE/4 of NW/4, NE/4, S/2 of Section
Section 33 - NW/4
Section 34 - S/2 of SW/4

APPENDIX J

NO. 35,984

THE CONTINENTAL GROUP, INC.

VERSUS

J. L. ALLISON, JR., ET AL

ELEVENTH JUDICIAL DISTRICT COURT
DESOTO PARISH, LOUISIANA

OPINION

This is a suit for declaratory judgment, in which the plaintiff, The Continental Group, Inc., seeks in its principal demand a judgment declaring that mineral servitudes, created by mineral reservations in certain acts of sale executed in 1956, included only the right to drill for and produce oil and gas, and not the right to recover lignite or any other substance extractable by the strip-mining process.

The defendants in this suit, some seventy-five in number, are former shareholders (or their successors, heirs or assigns) of Mansfield Hardwood Lumber Company, which corporation has been liquidated and dissolved.

In 1956, Mansfield Hardwood Lumber Company (hereinafter referred to as "Mansfield") sold approximately 90,000 acres in seven (7) Louisiana Parishes to Robert Gair Company, Inc. (hereinafter referred to as "Gair"). The acts of sale contained the following mineral reservation:

> "There is expressly excluded from this sale, and the Vendor reserves, all mineral rights in the

lands conveyed hereunder and all mineral rights, if any, that Vendor may own in and to the lands above described which are affected by said leasehold instruments, with the right of ingress and egress for the proper exploitation of the same. The Vendor, or its lessee, shall pay the Vendee for all damage done to timber, wood or other forest products or the property of the Vendee on the lands conveyed hereunder and the lands above described which are affected by said leasehold instruments, in connection with operations by the Vendee or its lessee in the course of such exploitation and shall assume the payment of, and pay any taxes levied on all minerals produced from such operations, or the increase in the value of the land, if any, caused thereby or by the equipment placed thereon in connection with such exploitation."

Some of the circumstances preceeding the 1956 sale, as aforesaid, are as follows: In late 1954 Mansfield, the owner of some 93,000 acres of timberlands in nine North Louisiana parishes (including DeSoto Parish), undertook negotiations with several prospective purchasers of its lands, including International Paper Company. After rejecting an offer from International Paper as being too low, Mansfield's president, A. S. Johnson, initiated discussions with Robert L. Fitts, the president of Southern Advance Bag & Paper Company, a substantial land owner in Louisiana and operator of a large pulp mill and kraft bag plant at Hodge. Within a few months of the negotiations between Johnson and Fitts, Southern Advance entered into an agreement by which its assets were acquired, in May, 1955, by Robert Gair Company, Inc., itself the owner of large timber holdings and a manufacturer of paper products. Robert Fitts became an officer and director of Gair, and the General Manager of its Southern Advance Division, which included the Louisiana lands and the Hodge mill. Negotiations between

the representatives of Mansfield and Gair continued, resulting in the execution of an agreement dated September 29, 1955, providing for the sale of the timberlands to Gair, following examination of titles, for $95.00 per acre, or a total price exceeding $8,000,000.00. The sale was to be consummated by a deed or act of sale in the form annexed to the Agreement to Sell, which reserved to the seller a vendor's lien and special mortgage and also reserved the mineral rights to the seller. Following title examination and other preliminaries, the sale was consummated on May 25, 1956. In the latter part of 1956, Gair, purchaser of the Mansfield land, was merged into Continental Can Company, Inc., which by change of name, subsequently became The Continental Group, Inc., the plaintiff in this proceeding.

So far as Mansfield is concerned its agreement to sell its principal assets, that is, its timberlands, was the first step in the liquidation of the corporation. Among the assets of Mansfield (being liquidated) were the mineral rights reserved and described in the sale by Mansfield to Gair. These mineral rights were distributed to all of the stockholders in proportion to their ownership. The defendants in this suit are the distributees of the corporate assets, and/or their successors, heirs and assigns, together with certain attorneys, their successors, heirs and assigns, who obtained a portion of Mansfield's stock from certain minority stockholders who, as plaintiffs, had successfully prosecuted a suit (in Federal Court) for the recovery of their shares of Mansfield, which they had previously sold in fraud of their rights.

Aside from providing the identity of the parties to this suit, the Gair merger into Continental Can, nor the stockholders' suit, as aforesaid, have direct bearing upon the confection of the Agreement to Sell, as

above described, but the records of each party provide sources of documenting matters — contemporary to the sale — concerning the circumstances in which the parties contracted.

The present suit is about lignite coal and the only known method of reducing same to possession, namely, strip-mining.

Historically, and before the drilling of oil and gas in DeSoto Parish, the existence of lignite coal in the Dolet Hills area of the southern part of the parish was known by the early pioneers, who had seen lignite outcropping. Although some effort was made around the turn of the century to utilize lignite as fuel, these ventures were quickly found to be impractical and of no domestic or commercial value. On the other hand, DeSoto Parish was one of the pioneer parishes in the production of both oil and gas. Commencing circa 1911-1912 and continuing to date, for a period of nearly 70 years, literally hundreds and even thousands of wells have been drilled in search of oil and gas throughout the whole parish, many of which resulted in commercial producers. These endeavors have contributed substantially to the welfare and economy of the parish. Indeed, DeSoto Parish has contributed greatly to the creative jurisprudence of the oil and gas industry. To mention but a few of the historical cases arising in DeSoto Parish, the names of the following cases come to mind: Frost-Johnson Lumber Co. v. Sallings Heirs, 150 La. 756, 91 So. 207 (1922) (reservation); Wemple v. Nabors Oil & Gas Co., 154 La. 483, 97 So. 666 (1923) (sale); Sample v. Whitaker, 172 La. 722, 135 So. 38 (1931); Frost-Johnson Lumber Co. v. Nabors Oil & Gas Co., 143 La. 100, 88 So. 723 (1920-1921); Nabors Oil & Gas Co. v. Louisiana Oil Refining Co., 151 La. 362, 91 So. 765 (1922).

All the dreams, hopes, expectations that might have existed in the minds of the early land owners, mineral owners, prospectors and would-be lignite coal minerals (few in number) around the turn of the century quickly vanished and the term "lignite" itself, while appearing in early legal instruments, fell into a state of desuetude, and what might have developed into a viable industry simply became dormant in the tide of the discovery and development of the oil and gas industry in DeSoto Parish and throughout the State of Louisiana. From the very beginning of the limited knowledge of lignite deposits to date there has been no mining for this resource in Louisiana. Not until the latter part of the 1950's and early 1960's did anyone evidence any renewed interest in the potential of lignite. Central Louisiana Electric Company during that period conducted some core drilling in connection with a study to determine whether lignite could be economically developed. Cleco's study resulted in the conclusion that extraction of lignite from the Dolet Hills area of DeSoto Parish was not economically feasible. An aroused interest in the lignite deposits of DeSoto Parish began during the early part of the 1970's, brought on in part by the increase of the price of oil imposed by the O.P.E.C. oil cartel, and coupled with an increased awareness by our nation's top petroleum and natural gas experts that the nation's supply and reserves in both oil and gas were being seriously depleted.

To date the only known deposits of lignite in Louisiana of any consequence are found to be in DeSoto parish and its adjoining parishes of Red River, Sabine and Natchitoches. Most of the knowledge of these deposits is a result of extensive boring and testing conducted within the last ten years, principally by utility companies desirous of utilizing lignite as a fuel in the process of generating electricity. Thus the

slumbering giant was aroused and now appears to be demanding its share of attention in the energy industry.

Surface mining has historically caused serious problems in areas of the United States where practiced — so serious as to provoke the Congress of the United States to recently adopt comprehensive surface and reclamation legislation in the form of Public La 95-87 adopted in 1977. The State of Louisiana pursuant to provisions of the Federal law adopted its own law (styled from the Federal act) in the form of Act 406 of 1978. Unquestionably, this Louisiana legislative act was adopted in anticipation of the development of surface or strip-mining employed in the recovery of lignite coal.

"Lignite coal is found in veins of varying thickness below the surface at depths of 25 to 200 feet. The surface depth above the vein of coal, called overburden, must be entirely removed by powerful machines before extracting the coal for market. This process of extraction, called strip-mining, completely eliminates the surface owner's enjoyment of the portion of the property being mined", is a quote from the case, River Rouge Min., Inc. v. Energy Resources of Minn., 331 So. 2d 878.

This present case was filed on September 23, 1977, and after months and months of tireless effort, study and application on the parts of respective counsel, during which time exhaustive discovery was employed by each side, finally the case was tried, with the reception of evidence consuming a full week. Each side has presented the court with extraordinarily brilliant and comprehensive briefs commensurate with each's appreciation of the legal complexities presented in this case.

The primary question for the court's determination is whether a reservation of "all mineral rights" should be construed as establishing or recognizing in the owner of this reservation those sovereign rights enjoyed by a landowner some of which are: "A landowner may use and enjoy his property in the most unlimited manner for the purpose of discovering and producing minerals, provided it is not prohibited by law ***." LSA-R.S. 31:8. "A landowner may convey, reserve, or lease his right to explore and develop his land for production of minerals and to reduce them to possession." LSA-R.S. 31:15. "The basic mineral rights that may be created by a landowner are the mineral servitude, the mineral royalty, and the mineral lease ***." LSA-R.S. 31:16.

The defendants in this case argue that their reservation of "all mineral rights" was not subject to any restriction or limitation whatsoever, and accordingly, they as owners of "all mineral rights" have essentially the same basic rights that are enjoyed by the landowner (who owns all of mineral rights).

The defendant further argues that the reservation of "all mineral rights" is free from ambiguity, and therefore no extrinsic or parol evidence should be received for the purpose of attempting to restrict the fullest meaning that could be accorded to the reservation.

The plaintiffs on the other hand argue that because the term "minerals" has no precise definition, that extrinsic evidence should be permitted to show limitation according to the intention of the parties using it and in determining its meaning, regard must be had not only to the language of the deed in which it occurs, but also to the relative positions of the parties interested and to the substance of the transaction which the deed embodies, citing the Supreme Court case of

Holloway Gravel Co. v. McKowen, 200 La. 917, 9 So. 2d 228. I agreed with plaintiff's argument and opened the case for the reception of all evidence that could possibly have shed light on the circumstances surrounding the deed wherein the reservation was made, and I also freely allowed the testimony of expert witnesses in geology, forestry, mining engineering, mineral leasing, and also the testimony of legal scholars, both teachers and practitioners, all for the purpose of assisting me in making a just decision, and to make a complete record for any reviewing court, should my decision be appealed.

Simply stated, the plaintiff's position is that the reservation "all mineral rights", as contained in the sale of 1956, should not be construed to embrace the substance "lignite" along with the right to strip-mine the timberlands sold, but should be construed as comprehending oil and gas only, with the right to recover same through techniques commonly known to the legal, lay and petroleum industry; i.e., by drilling, setting pipe, and drawing to the surface by pumping and/or pressure provided by nature or supplied by man to the producing formation below the earth's surface.

In support of its position the plaintiff's counsel has scrutinized and analyzed every available document in the possession of all parties to support their conclusion that strip-mining was not contemplated by the parties. Likewise, the defendants have carefully examined all pertinent documents available to them to support their position that nothing less than the whole was contemplated by the reservation "all mineral rights". I see no good purpose attempting any minute analysis of the respective briefs filed herein, but will be content with the simple observation and conclusion that I find nothing in the documentary or testimony evidence to convince me that either side at

the time of the sale possessed even the faintest idea that strip-mining might be conducted under the mineral reservation.

The jurisprudence seems to support the conclusion that the servitude theory is applicable both to the solid minerals as well as to oil, gas and other minerals occurring naturally in liquid or gaseous form, etc. and however described no "mineral estate" distinct and independent of the surface estate can be established, but there is established merely a servitude upon the land in which the minerals lie and giving the right to extract and appropriate them. See comments under LSA - R.S. 35:5-6.

The reservation in this case makes no listing of "minerals" but employs the language "mineral rights" preceded by the adjective "all" which would support the conclusion that both sides generally understood that all revenues derived from anticipated mineral exploitations would go entirely to the owner of the mineral reservation and none to the landowner. While the plaintiff may now well be interested in obtaining an economic advantage because of the present commercial value of lignite, this fact, if so, can only assuage the trauma of seeing the growing timberlands strip-mined over possibly every acre, without any supervisory control over the operations.

It is safe to say that most all mineral transactions in this vicinity do not attempt to create an "all mineral" servitude. The common sale or reservation is usually one-half reserved to the seller with one-half going with the land purchaser. Of course, there is no prohibition against, and in some instances the parties do, contract for other fractional divisions. Where a fractional division of the ownership between the landowner and the servitude owner occurs, then the landowner has some control over the type of operations that may be conducted on his land.

It is the "all" mineral servitude that brings the parties, namely, the owner of the land burdened by a mineral right and the owner of the mineral right, into an unavoidable crash course. This is where the parties are in this lawsuit.

There seems to be no question that the owner of land, possessed with rights to enjoy his property in the most unlimited manner for the purpose of discovery and producing minerals, can if he so desires, make an intelligent conveyance or reservation of those extensive rights, and the courts ordinarily will not interfere with the parties' freedom to contract. However, where ambiguity exists, the courts must resolve disputes.

The plaintiff in this case is not asking the court to void the entire transaction, but is asking the court to limit the extent of the servitude.

The evidence in this case indicated that had the purchaser known at the time of the transaction that every acre of the timberlands acquired by it would be subject to strip-mining, that it would not have made the purchase.

Whether the seller of the timberlands would have sold the lands with a restriction against strip-mining is difficult to say. The evidence does show that the seller was interested in selling the lands for the very best price that they could get, in this case $95.00 per acre. How much value they attached to the mineral reservation is a matter of sheer speculation.

The purchaser clearly indicated at the time of the sale no interest in purchasing the minerals because they were interested primarily in timber growing economics. This was indicated by their failing to make any issue over the mineral reservation, and additionally their unwillingness to purchase the mineral rights at the reduced offer by the seller at the price of $10.00

per acre. The fact that someone else owned the mineral rights simply appeared to be of no great concern to them. Mr. Holmes, the forester, presently employed by the plaintiff, and who was formerly employed by Mansfield Hardwood Lumber Company, testified that both his present and past employers had never given great concern over the fact of who owned the minerals, because in most instances the minerals, as a practical matter, would revert to the land owner, anyway, and that even where "oil and gas" wells were drilled and were being operated, that they did not present any great problem to the forestry operations. He did, however, express grave reservations about the hazard of strip-mining to the future use of the lands for growing timber. It is safe to say that for all practical purposes that mineral economics never occupied a high position in the organizational structure or the operations of either of the owners of the lands in question. Both were timber producers.

Some Civil Code articles which are considered important and persuasive in the resolution of the issues are as follows:

Article 709 (prior to the 1977 revision) reads:

"Owners have a right to establish on their estates, or in favor of their estates, such servitudes as they deem proper; ***"

"The use and extent of servitudes thus established are regulated by the title by which they are granted, and if there be no titles, by the following rules."

Article 753 (prior to the 1977 revision) reads;

"Servitudes which tend to affect the free use of property, in case of doubt as to their extent or the manner of using them, are always interpreted in favor of the owner of the property to be affected."

Article 655 (prior to the 1977 revision) reads:

"One of the characteristics of a servitude is that it does not oblige the owner of the estate subject to it to do anything, but to abstain from doing a particular thing, or to permit a certain thing to be done on his estate."

Article 1957 reads: "In a doubtful case the agreement is interpreted against him who contracted the obligation."

Article 1958 reads: "But if the doubt or obscurity arise for the want of necessary explanation which one of the parties ought to have given, or from any other negligence or fault of his, the construction most favorable to the other party shall be adopted, whether he be obligor or obligee."

There is a dearth of Louisiana cases in which the courts have been required to define precisely the *use and extent* of servitudes, particularly mineral servitudes. The old case of Delahoussaye vs. Landry, 3 La. Ann. 549 (1848) had this to say:

> "About the period of the defendant's purchase, cotton, corn & c., were the sole products of cultivation in the neighborhood. There was but one sugar house in the whole parish, which was shortly after abandoned. The district judge, in view of the situation of the land, and the condition of the country at the remote period of the sale, was of opinion that the change in the culture of the defendant, twenty years after the purchase, from cotton to sugar, would essentially change and augment the burthern of the servitude, and that the provision of the quantity of wood necessary for the manufacture of sugar from the lands of the vendor, could not have been in the reasonable contemplation of the parties at the time of making their contract; nor did the judge consider that, according to the rules of law, for the interpretation of servitudes, the right claimed by the defendant could be supported.

> "In this opinion of the judge we concur. At the time this servitude was created, it was not onerous, and the estate affected could support it without deterioration. Sugar was not then one of the staple products of the State. The present wants of the plaintiff, for the new product of his land, increased many fold, and may increase still more, the burthern; so that what was originally within the province of the parties, agreed to as a common or ordinary servitude may become a devastation, and destroy the value of the burtherned estate."

In the case of Huie Hodge Lumber Co. v. Railroads Land Co., 151 La. 197, 90 So. 676 (1922) the Louisiana Supreme Court held that oil and gas were not included in a reservation of "the exclusive right to the iron, coal and other minerals", and after the author of the opinion had said: "In order to do this, we should consider the conditions and circumstances surrounding the parties at the time, together with the terms and language used with respect to the things reserved."

The opinion in Huie Hodge went on to say:

> "*** Terms are to be understood in their plain, ordinary and popular sense, unless they have acquired a particular technical sense by the known usage of the trade. They are to be construed with reference to their commercial and their scientific import. This rule is of special importance when the question arises whether a specific mineral is included."

A full reading of Huie Hodge, when applying the rule of ejusdem generis, reveals that the court was applying the broader rules of construction than merely choosing to ground the decision on ejusdem generis.

In the case Holloway Gravel Co. v. McKowen, 200 La. 917, 9 So. 228 (1942), it was said: " 'The term mineral' is not a definite one, capable of a definition of universal application, but is susceptible of limitation

according to the intention of the parties using it, and in determining its meaning regard must be had, not only to the language of the deed in which it occurs, but also to the relative positions of the parties interested, and to the substance of the transaction which the deed embodies."

The opinion in Holloway went on to say that the reservation "mineral, oil and gas right", did not include sand and gravel, and the court while applying the rule of ejusdem generis, appears to have applied broader rules of interpretation than just the rule of ejusdem generis, saying "*** It would not be reasonable to construe the reservation of 'minerals, oil and gas rights' so as to embrace the right to exploit minerals which could not be removed from the land without destroying its surface for agricultural and grazing purposes."

The Court of Appeal in the case of River Rouge Min., Inc. v. Energy Resources of Minn., 331 So.2 878 (writs refused) addressed the question of whether lignite (and strip-mining) was included within the term "all other minerals" as used in the conventional oil, gas and mineral lease. The court found strip-mining operations to be inconsistent with practically every provision contained in the lease form. While the court devoted most of its opinion to a careful scrutiny of the provisions contained in the lease agreement, a very significant observation was made in its comment about the Holloway Gravel case, supra. The court said:

> "The court also noted that the digging of gravel, strip-mining to a lesser degree than extracting lignite coal, would be incompatible with the agricultural use being made of the property."

The Court in River Rouge pointed out that with the grant of the lease that the landowner (lessor) intended

to continue his use of the property during exploration and production.

The court in Holloway, supra, contemplated the use and enjoyment of the land by the landowner, saying:

> "Mr. McKowen is a farmer, and he testified that he purchased the property for grazing and agricultural purposes. As any operation on the land for sand or gravel would result in the utter destruction of its surface, it is not difficult to reach the conclusion that such operation would greatly impair, if not wholly destroy, McKowen's rights which it was the purpose of the clause to protect. ***"

While the court in Holloway was construing specific language contained in the contract as follows: "the vendors, their heirs, executors, administrators, and assigns, shall always exercise and have due regard for the right of the purchaser, his heirs and assigns, as owner of the land", it is submitted that the results reached in that decision would have been the same absent such a provision. As pointed out before, there seems to be no question that a landowner is permitted to place a very heavy burden upon his land by a servitude grant, but such an extreme grant should be recognized only where the parties reasonably and clearly contemplated that the exercise of the servitude would deny to the landowner the total temporary or permanent use of the lands. If such a severe servitude had even slightly been alluded to, is it reasonable that anyone in his right mind would have gone through with the purchase, knowing that he would be severely handicapped in the growth of timber, the very object of his purchase?

The defendants strenuously argue that the transaction contemplated that the landowner would be protected in his use of the land, and that any interference would be only temporary, and that the servitude would be required to restore the land after strip-

mining operations to its former status, and that the landowner would be fully compensated for his losses and in that connection directs to the court's attention the words contained in the reservation as follows:

> "*** The Vendor or its lessee, shall pay the vendee for all damage done to timber, wood or other forest products on the property of the vendee on the lands conveyed hereunder, and the lands above described which are affected by said leasehold instrument, in connection with operations by the vendee (sic) or its lessee in the course of such exploitation ***"

Defendants further argue that Gair's officers obviously were aware that a servitude for the exploitation of solid minerals would involve surface mining of the timberlands. Defendants further argue that both Federal and State reclamation laws now insure proper use of the surface on which lignite is mined so that there is no doubt that the land will be returned to timber production. Defendants further argue that this transaction was the result of efforts by top executives of the respective corporations, assisted by competent and articulate lawyers; thus they submit, a clear understanding was had by all parties that the servitude grant was as extensive and as heavy a burden as could be placed upon the land, and therefore, covered lignite and the right to strip-mine without any restriction or limitation.

Plaintiff argues about the reservation as follows:

"(A) There is a complete absence of any reference to hard minerals generally or to lignite specifically.

(B) The parties failed to provide for strip-mining directly or by inference — even though jurisprudence at the time clearly held that such a right must be expressly conferred.

(C) There is no surface reclamation provision of any kind.

(D) There is a timber damage clause stipulating *only* for damage to timber and forest products and property of the purchaser *on* the lands; as will be discussed further below, the parties *did not provide for payment of damages to the land itself or for compensation for future timber growth.* ***"

In connection with the question of reclamation, probably the most significant testimony received in the trial of this case was that of Mr. Winston Sahinen, defendants' mining expert, who acknowledged on cross examination in his opinion:

"There is no question that the surface mining destroys the surface and renders it useless during the mining operations. I would state that even with restoration, it takes tens of years to restore the soil and even at best, the surface can only be partially restored, the overall effect being detrimental."

Mr. Holmes, the forester who testified as an expert for the plaintiff, stated that foresters simply do not yet know how well pine trees will grow following attempt to restore the land after strip-mining.

One has to make but a cursory examination of the recently adopted Federal and State surface mining and reclamation acts to sense the complexity of the strip-mining process, and the enormity of the problems experienced throughout the nation where strip-mining has been practiced.

I have carefully considered every argument advanced by opposing counsel, and have studied each case and codal provision cited in respective counsels' briefs. Each side has presented its case in an erudite and powerfully persuasive manner, and I am of the opinion that the case could be reasonably decided either way.

In Whitehall Oil Company, Inc. v. Heard, 197 So. 2d 672, (La. App. 3d Cir. 1967) writ refused, 199 So. 2d 923, the court in construing a mineral reservation held as follows:

> "Ultimately we concluded that, where the instrument could as reasonably be interpreted either way, the proper interpretation is that which least restricts the ownership of the land conveyed, as in the case of mineral servitudes (citations omitted). In so concluding we rely on the legislative mandate that 'Servitudes which tend to affect the free use of property, in case of doubt as to their extent or the manner of using them are always interpreted in favor of the owner of the property to be affected.' LSA - Civil Code Art. 753. See McGuffey v. Weil, 240 La. 758, 125 So. 2d 154."

In this case Mansfield prepared the reservation, having full knowledge that Gair was acquiring the lands for timber growing purposes; therefore, Mansfield, it would seem, should be charged with the doubt or obscurity arising for the want of necessary explanation, in which case the construction most favorable to the other party should be adopted. See LSA-C.C., Arts. 1956, 1957, 1958.

Counsel for the plaintiff has cited numerous cases from other jurisdictions which have addressed the question of what minerals are included in a grant or reservation of "all minerals". The great weight of authority in those other jurisdictions appears to construe the term in a manner consistent with local custom and usage regarding mineral conveyances to determine what minerals were within the contemplation of the parties. With regard to the method of recovery, the weight of authority seems to hold that absent an express intention to the contrary, substances which may be exploited only by strip or surface mining techniques are not included within a grant

or reservation of minerals. While the theory or approach to the problem may vary from jurisdiction to jurisdiction, the results reached by all appear to be the same. One cannot help but detect the policy influence of the decisions.

I am convinced that at the time the mineral reservation in this case was made, that the parties did not contemplate that the servitude would be so extensive and burdensome as to practically destroy the use of the land by the owner, and had the subject of strip-mining been remotely in the minds of the parties, (both timber growers) then common sense would dictate that no sale would have been consummated, without additional accommodation so as not to defeat the purpose (object) for which Gair acquired the lands.

Defendants argue that should a decision herein favor the plaintiff, that they have planned to abandon their use of the lands for timber growing and undertake the development of coal mining. I do not consider the contemplated future use of the lands by its owner to be relevant to what the parties contemplated at the time of the sale and reservation. See River Rouge and Holloway cases, supra.

Moreover, placing the ownership of lignite in the land owner is not inconsistent with the original object of his purchase, for as owner it then can be secure in the knowledge that all decisions with reference to the future use of the land can be made with wisdom so as to preserve and maintain an economic balance between strip-mining for lignite and the present and long range timber growing. Placing the ownership of lignite in some seventy-five widely scattered owners, who have no interest in the present or future use of the surface of the land, and expecting any affirmative concern about the welfare of the land owner is unrealistic.

While the recently enacted surface mining and reclamation acts appear to provide some protection to the landowner, there still remain many long-range problems not covered by the legislation, and in this connection the testimony of the expert witnesses, Sahinen and Holmes, should be carefully considered.

For the foregoing reasons, I conclude that the substance "lignite", and the process of strip-mining therefor, should not be recognized as rights included under the mineral reservations made in the sales by Mansfield to Gair.

Other alternative prayers by the plaintiff herein need not be addressed in view of the conclusions reached on the primary demands.

I feel that the plaintiff should pay all costs of these proceedings.

The plaintiff is directed and ordered to prepare a formal judgment consistent with the conclusions herein reached, and submit same to the court for examination and rendition if found to be appropriate.

Mansfield, DeSoto Parish, Louisiana, this 15th day of March, 1979.

/s/ Jack E. Burgess
Judge

FILED March 15, 1979

/s/ Stewart W. Heard
Deputy Clerk

APPENDIX K

Supreme Court of Louisiana

DOCKET NO. 67,188

THE CONTINENTAL GROUP, INC.

VS.

J. L. ALLISON, JR., ET AL

MOTION TO VACATE AND SET ASIDE JUDGMENT

NOW INTO COURT, through undersigned counsel, come J. L. Allison, Jr., et al, Movants, who move this Honorable Court to vacate and set aside the judgment rendered on rehearing in this case on June 22, 1981 in that said judgment violates the Constitutions of the United States and Louisiana for the following reasons:

1.

In its original Opinion dated January 26, 1981, all seven Justices of this Honorable Court concurred in affirming the judgment of the Court of Appeal in favor of Movants.

2.

In this Court's Opinion on Rehearing, which reversed its original Opinion, a majority of this Court did not concur in the reasons given for judgment.

3.

Failure of a majority to concur violates Article 5,

Section 3 of the Louisiana Constitution of 1974, which reads, in pertinent part, as follows:

> "The supreme court shall be composed of a Chief Justice and six associate Justices, *four of whom must concur to render judgment...*"
> (emphasis added)

4.

As can be seen from a review of the Opinion on Rehearing, four members of this Honorable Court did not concur in the reasons for rendering judgment adverse to Movants. Specifically:

(a) Justices Calogero and Watson dissented from the Opinion on Rehearing;

(b) Justices Blanche and Marcus were of the opinion that the pertinent servitudes granted to Movants the right to explore for and remove lignite, but such right had prescribed;

(c) Chief Justice Dixon was of the opinion that Movants' right to explore for and possess lignite had prescribed; and

(d) Justices Dennis and Lemmon were of the opinion that the servitudes in this case did not grant to Movants the right to mine lignite.

5.

In order "*to concur to render* judgment," a majority of the Justices of this Honorable Court must agree on the reasons given for judgment.

6.

As a result of the foregoing, it can be seen that a majority of this Honorable Court did not concur and thus, the Opinion on Rehearing violates Article 5, Section 3 of the Louisiana Constitution of 1974.

7.

As this Court pointed out in *Suhor v. Gusse*, 388 So2d 755 (La. 1980) in Footnote 3 on page 756:

> "On rehearing before a panel of five Judges, the judgment of the trial court was affirmed for lack of a majority to change it."

Here, since no majority of this Court concurred in the reasons assigned for the Opinion on Rehearing, the Original Opinion rendered on January 26, 1981 should be reinstated.

8.

Said Opinion on Rehearing violates Article 1, Section 10 of the Constitution of the United States in that it violates and impairs the contract between the parties.

9.

A *majority* of the members of this Court held that the contract between the parties granted unto Movants the right to exploit the lignite under the pertinent servitudes. Yet, no majority of this Court stated that the right to mine the lignite had prescribed. A *minority* of this Court, therefore, issued an opinion which is not sanctioned by the Louisiana Constitution but which, nevertheless, prevents Movants from exercising their rights under a valid contract. The *minority*, but controlling, *opinion*, therefore, violates said Article 1 of the Constitution of the United States.

10.

All Movants are citizens of the United States. The Opinion on Rehearing violates the Fourteenth Amendment to the Constitution of the United States for the following reasons:

a. The Opinion on Rehearing deprives Movants of their property without due process of law. As stated by a majority of this Honorable Court, Movants have a valid contractual right to exploit lignite under the Mansfield servitudes. By judicial fiat, since no majority of this Court agreed on the reasons for judgment, this Court's Opinion on Rehearing deprives Movants of their right to exploit the lignite without due process of law;

b. The Opinion on Rehearing deprives Movants of the equal protection of the laws. Through this Honorable Court, the State of Louisiana has deprived Movants of their rights as citizens to the equal protection of the laws. Because no majority of this Court concurred in its reasons for its Opinion on Rehearing, the decision in this case is not binding on any other citizen of the State of Louisiana or any other state and thus, these Movants, standing alone, do not receive the equal protection of the law guaranteed them by the Constitution of the United States. See, e.g., *Hertz v. Woodman*, 218 U. S., 205, 30 Sp. Ct. 621, 54 L.Ed. 1001 (1910); *U. S. v. Pink*, 315 U. S. 203, 62 Sp. Ct. 552 86 L.Ed. 796, (1942), and *U. S. v. Friedman*, 528 F.2d 784 (10th Cir. 1976).

11.

The Opinion on Rehearing deprives Movants of their vested rights, without due process of law, in that, as stated by a majority of this Court, Movants' rights to the minerals vested under the 1956 contract. Exploration for and/or production of minerals from the pertinent servitudes prevented liberative prescription from running against said servitudes notwithstanding that *only* three members of this Honorable Court held that liberative prescription had accrued. Without a majority of the members of this Court concurring that liberative prescription has ac-

crued, the Opinion on Rehearing deprives Movants of their vested rights in the mineral lignite.

12.

As shown by copies of the articles from *The* (Shreveport) *Times* of August 11, 1981 and December 6, 1981, attached hereto as exhibits, technology for gasification of DeSoto Parish lignite has been developed.

13.

This Court, and even the Continental Group, Inc., plaintiff, acknowledge that Movants are entitled to exploit oil, gas and *kindred* minerals. Gasified lignite certainly is a mineral "kindred" to oil and gas.

14.

As a result of the foregoing, the Opinion on Rehearing is unclear whether Movants have the right to exploit the lignite and, unless vacated, will lead to further confusion and litigation.

WHEREFORE, for the foregoing reasons, Movants, J. L. Allison, Jr., et al, pray that this Court vacate and set aside the Opinion on Rehearing rendered on June 22, 1981 and restore the Original Opinion granted on January 26, 1981.

Respectfully submitted,

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WIENER, WEISS, MADISON & HOWELL

BY:_____

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ATTORNEYS FOR J. L. ALLISON, JR., ET AL, MOVANTS

CERTIFICATE

I hereby certify that a copy of the above Motion was this day served on plaintiff, by placing a copy of same in the United States Mail, with proper postage affixed, addressed to all counsel of record:

Blanchard, Walker, O'Quin & Roberts
P.O. Box 1126
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D. Scott Brown
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Howard W. Wright, Jr.
P. O. Drawer K
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Shreveport, Louisiana, this 7th day of December, 1981.

/s/ John Madison, Jr.
Of Counsel

Exhibits Referred To in Paragraph 12 Of Motion To Vacate And Set Aside Judgment

Article from *The* (Shreveport) *Times* of December 6, 1981, not reprinted here.

Article from *The* (Shreveport) *Times* of August 11, 1981, not reprinted here.

APPENDIX L

The Supreme Court of the State of Louisiana

NO. 67,188

THE CONTINENTAL GROUP, INC.

VERSUS

J. L. ALLISON, JR., ET AL.

In Re: J. L. Allison, Jr., et al. applying for Motion to Vacate and set aside the Opinion on Rehearing rendered on June 22, 1981 and restore the Original Opinion rendered on January 26, 1981.

January 8, 1982

Not considered. The judgment rendered herein is final.

FAB
JAD
WFM
JLD
HTL

CALOGERO and WATSON, J.J. dissent. We would consider this Motion to Vacate and Set Aside Judgment as an application for rehearing and grant same. Applicant has been afforded no opportunity in this Court to raise the issue presented in this motion. It was only after this Court denied the rehearing application that applicant received a copy of the concurring opinion of one Justice of this Court, creating a

vote lineup which is the substance of the pleading presently filed. Since our rules do not provide for second application for rehearing by a given losing party, we would consider the complaint under our supervisory jurisdiction, forge a reasonable rehearing opportunity and entertain the complaint now, rather than have applicant protest the effect of this judgment again in the trial court or seek relief on alleged constitutional violations in the Federal courts.

The issue raised is a serious one. We should at least entertain it. Applicants contend that four, perhaps five members of this Court have concluded that vendors retained the lignite rights, and only three members of this Court have held that their right to explore for that lignite has prescribed. Yet they have lost their valuable mineral deposits.

Not considering this application should not be the course taken at this juncture by this Court.

Supreme Court of Louisiana

s/Frans J. LaBranche, Jr.
Clerk of Court
For the Court

Opposition

Office - Supreme Court, U.S.
FILED
MAR 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1484

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

J. L. ALLISON, JR., *et al.*, *Petitioners*,

v.

THE CONTINENTAL GROUP, INC., *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1484

J. L. ALLISON, JR., *et al.*, *Petitioners*,

v.

THE CONTINENTAL GROUP, INC., *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

I.

STATEMENT OF THE CASE

This litigation concerns two basic questions of Louisiana mineral property law.

In 1956, Mansfield Hardwood Lumber Company, Petitioners' predecessor in title, conveyed some 90,000 acres of timberland to Robert Gair Company, Inc., Respondent's corporate predecessor. The sale was made with express reservation to the seller of "all mineral rights." Through ensuing years, Petitioners' mineral activity was confined solely to the conduct of oil and gas operations on certain of the lands. During the 1970s, lignite, a form of low-grade coal which had never been produced in Louisiana because of economic infeasibility, achieved commercial interest as a result of escalating prices of oil and gas. Thus a dispute developed between Petitioners and Respondent as to whether Petitioners had the right to strip mine the

timberlands for lignite. That dispute presented these two questions of Louisiana law:

> (i) whether a broadly stated mineral reservation or deed should be construed by the courts to include only those minerals which were known by the parties to exist and which were commercially producible at the time of the reservation or grant thereof, and, if not,
>
> (ii) whether the Louisiana Civil Code articles providing for prescription (statutes of limitation) against a mode or method of using a servitude were applicable to restrict or reduce rights of use under a mineral reservation or deed.

In the early days of oil and gas development in the state, the Louisiana Supreme Court, as a matter of public policy, rejected the concept of ownership of minerals in place, instead adopting a non-ownership theory by analogy to Louisiana's Civil Code principles of servitude. Under that analogy, the mineral or servitude owner enjoys only the right to go upon the affected land and to explore for and produce the minerals. [1]

Servitudes are susceptible to loss or restriction by a period of ten years prescription. Thus, under Civil Code Article 789, [2] a servitude is lost entirely if it is not used within ten years of its

---

[1] *Frost-Johnson Lumber Company* v. *Salling's Heirs*, 150 La. 756, 91 So. 207 (1922).

[2] "Art. 789. A right to servitude is extinguished by the non-usage of the same during ten years."

[As such article existed prior to Louisiana Act 514 of 1977, Section 1, effective January 1, 1978, amending and re-enacting Title IV of Book II of the Louisiana Civil Code of 1870, *Predial Servitudes*. The 1977 act is not an issue in this proceeding. References in this brief to Louisiana Civil Code articles relating to servitudes are to the law as it existed prior to the 1977 act.]

creation. Moreover, under Civil Code Articles 796 and 798,[3] one or more modes or methods of using the servitude are lost if not exercised within the ten year prescriptive period, and use of the servitude becomes restricted to only those modes or methods which have been employed.

Long-settled jurisprudence comprehends the application of the ten year prescriptive period for servitudes to mineral rights. However, not until the disposition of this suit had a court squarely held that mode of use prescription was likewise applicable to minerals.[4] In that connection, Respondent urged that, since Petitioners had done no more than drill small-diameter holes for oil and gas, the mineral servitudes, by application of mode of use prescription, became restricted in 1966 (ten years from their creation) to continued use only for oil and gas drilling activities. The mineral rights accordingly could not be more extensively enjoyed by any other method such as strip mining for lignite, a use which would preempt any surface enjoyment at all by the landowner, including the growing of timber, for which the lands were acquired and to which they had been continuously devoted since 1956.

---

[3] "Art. 796. The mode of servitude is subject to prescription as well as the servitude itself, and in the same manner.

"By mode of servitude, in this case, is understood the manner of using the servitude, as is prescribed in the title."

"Art. 798. If, on the contrary, the owner has enjoyed a right less extensive than is given him by his title, the servitude, whatever be its nature, is reduced to that which is preserved by possession during the time necessary to establish prescription."

[As such articles existed prior to Louisiana Act 514 of 1977. See footnote 2, *supra*.]

[4] There were several Louisiana Supreme Court decisions persuasively indicating that Civil Code Articles 796 and 798 were applicable to mineral servitudes. See discussion *infra*, pages 13-14.

The two issues in the case were presented for resolution by Respondent by means of an action for declaratory judgment filed in the state district court in 1977. That court held [5] that the parties to the 1956 sale did not intend to include lignite in the mineral reservation, thereby determining that Respondent's ownership of the land was not burdened by mineral servitudes for exploitation of lignite coal. Thus the trial court was not required to reach the issue of mode of use prescription.

On appeal to the intermediate appellate court, the judgment of the trial court was reversed. [6] On the first issue, the Court of Appeal decided that the mineral reservation should be construed as comprehending lignite. On the prescription question, the court held that, by virtue of the adoption in 1974 of a new Mineral Code [7] which expressly eliminated the concept of mode of use prescription from Louisiana mineral law, the new code should be applied and the prescription issue decided in Petitioners' favor. [8] Accordingly, the court disposed of the prescription issue by retroactive application of the 1974 Mineral Code. [9]

---

[5] Petition for Certiorari, page A-74, et seq.

[6] Petition for Certiorari, page A-38.

[7] Louisiana Act 50 of 1974, effective January 1, 1975, now Louisiana Revised Statutes 31:1, et seq.

[8] The pertinent provision of the Louisiana Mineral Code is Article 40 (La. R.S. 31:40), reading as follows:

> "An interruption of prescription applies to all types of minerals covered by the act creating the servitude and to all modes of its use."

[9] Respondent argued that the provisions of the Mineral Code had no application to the dispute, and that mode of use prescription accrued in Respondent's favor in 1966, thus creating vested rights in Respondent which could not have been divested by enactment of the Mineral Code in 1974. In the courts below, Petitioners agreed that the resolution of the prescription question depended on what the law was in 1966, and that Respondent could not be constitutionally deprived of rights which would have vested upon the accrual in 1966 of mode of use prescription. Petitioners asserted, however, that Article 40 of the Mineral Code (quoted footnote 8, *supra)* codified

On application of Respondent, writs of review were granted by the Louisiana Supreme Court, which, on original hearing, affirmed the judgment of the Court of Appeal. On rehearing, the Louisiana Supreme Court reversed,[10] specifically holding that the mode of use prescription rules of the Louisiana Civil Code (Articles 796 and 798) were applicable to mineral servitudes created prior to adoption of the 1974 Mineral Code. Thus the right of Petitioners to exploit minerals other than oil, gas and kindred substances prescribed in 1966, ten years after the 1956 mineral reservation.[11]

The judgment of the Louisiana Supreme Court complained of by Petitioners here is founded purely and simply on a question of state mineral property law, that is, whether certain state statutes in effect since 1825 (Articles 796 and 798 of the Louisiana Civil Code) were applicable to mineral rights created in 1956. The court held that the articles indeed applied, and that

---

existing law, while Respondent urged that Article 40 represented a complete change in the law. Curiously, it is now *Petitioners* who, in this Court, assert that *failure* by the Louisiana Supreme Court to apply a subsequently enacted statute (Mineral Code Article 40) somehow deprives them of federally protected constitutional rights.

[10] Petitioners have made the bold, and unsupported, statement (Petition for Certiorari, page 4) that "for the first time in its judicial history, on rehearing, the Supreme Court of Louisiana reversed its own, original seven to zero (7-0) opinion." The contention is not only irrelevant but is patently incorrect. See, for example, *Friedman Iron & Supply Co.* v. *J. B. Beaird Co., Inc.*, 222 La. 627, 63 So.2d 144, (1953) and *Arkansas Louisiana Gas Company* v. *Parker Oil Co.*, 190 La. 957, 183 So.229 (1938), which immediately came to the minds of Respondent's counsel since members of their own law firm were involved.

[11] Three justices decided for Respondent on the mode of use prescription issue. Two other justices, who concurred in the judgment for Respondent, did not reach the prescription question, finding instead that the trial court had correctly determined that the parties never intended to include lignite in the 1956 reservation. The remaining two justices dissented. (Petition for Certiorari, page A-23, et seq.)

Petitioners' rights to exercise their mineral servitudes beyond the scope of the use made of them during the period 1956 to 1966 were extinguished by the application of those state statutes of limitation.

II.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

The Petition for Writ of Certiorari ("the Petition") patently fails to establish a federal question as a prerequisite to invocation of the jurisdiction of this Honorable Court. The arguments advanced in the Petition constitute only a last-ditch effort of unsuccessful litigants seeking one additional forum to hear their case on the merits. Petitioners did not raise a federal question at any stage of this protracted litigation until the decision of the Louisiana Supreme Court on rehearing. Significantly, after applying for a second rehearing, which was denied, [12] Petitioners served upon Respondent, on December 3, 1981, a Motion to Vacate and Set Aside Judgment (copy of which appears in the Appendix to this brief at page 3a). At no place in that pleading is there any mention whatever of a federal question. Obviously, even at the time of service of that Motion, almost two months after the Supreme Court's denial of Second Rehearing, Petitioners had not discerned any basis for a claim of violation of the United States Constitution. Respondent was later informed that Petitioners decided not to file the motion served on Respondent. Subsequently, Respondent was served with another "Motion to Vacate and Set Aside Judgment" [13] which was identical with the first except for the belated engrafting thereon of the same so-called federal questions raised in the Petition.

---

[12] Petition, p. A-36.

[13] Petition, p. A-94.

Petitioners allege violation of three provisions of the United States Constitution in asserting their reasons why a writ of certiorari should be granted. The application is without merit on its face; accordingly, this brief will respond sequentially to the reasons stated in the Petition without treating other grounds justifying denial of the Petition.

A. Petitioners Claim That Their Contract Rights Were Impaired Through Abrogation By The Louisiana Supreme Court Of Law Existing At The Time Of The 1956 Contract.

1. The elements required for a federal question of impairment of contract rights are not established.

The pertinent portion of Article I, Section 10, of the United States Constitution provides:

> "No State shall . . . pass any . . . law impairing the Obligation of Contracts. . . ."

The authorities cited by Petitioners in support of their position that their contract rights were unconstitutionally impaired clearly do not apply to the facts of this case.

Petitioners acknowledge that this Court's decision in *Cross Lake Shooting & Fishing Club* v. *Louisiana*, 224 U.S. 632, 32 S.Ct. 577, 56 L.Ed. 924 (1912) holds that the contract clause "usually" is not violated by "judgments by a state court interpreting laws in existence when a contract was made." [14] In fact, the decision in *Cross Lake* is much more devastating to Petitioners' attempt to create a federal question, since the Court held that:

> "It [the clause on impairment of contract] does not reach mere errors committed by a state court when passing upon the validity of laws in existence when it was made." 224 U.S. at 638.

---

[14] Petition, page 11.

Moreover, this Court set out in *Cross Lake* the necessary elements to a valid claim of impairment of contract:

> "But when a state court, either expressly or by necessary implication, gives effect to a subsequent law of the state whereby the obligation of the contract is alleged to be impaired, a Federal question is presented. In such a case it becomes our duty to take jurisdiction to determine the existence and validity of the contract, what obligations arose from it, and whether they are impaired by the subsequent law. But if there be no such law or if no effect be given to it by the state court, we cannot take jurisdiction, no matter how earnestly it may be insisted that that court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired." 224 U.S. at 639.

The establishment of a federal question on impairment of contract rights therefore requires: (i) a favorable statute in effect at the time of the contract; (ii) a subsequent adverse statute; and (iii) application of the *subsequent adverse statute* by a court to deprive the claimant of rights under the contract. Not a single one of these three elements is presented in this dispute.

In an effort to assert a claim in the face of the requirements of *Cross Lake*, Petitioners allege that certain exceptions to the *Cross Lake* rule have been developed. The two exceptions claimed by Petitioners are (i) that a violation of the clause occurs if a state court's decision is *dependent* upon the *subsequent adverse statute* even if the court does not expressly apply the statute, and (ii) that favorable judicial construction of a statute at the time a contract was entered forms a part of the contract. Again, the very authorities cited by Petitioners demonstrate that the claimed exceptions are wholly inapplicable to the facts of this case.

For the first exception, Petitioners cite two decisions by this Court and a Third Circuit opinion, *Mariniello* v. *Shell Oil Co.*,

511 F.2d 853 (3d Cir. 1975) applying those cases, as support. *Mariniello* provides the following statement of the "exception":

> "There has developed a tightly circumscribed exception to the general rule that is described in *Cross Lake. Columbia Railway Gas & Electric Co.* v. *South Carolina* and *Terre Haute & Indianapolis Railroad* v. *Indiana* are cited for the proposition that a state decision may, without express reliance on a statute '*by necessary implication* [give] effect to a subsequent law of the state. . . .' However, the two cases embodying the deviation from the elemental rule that legislation be required to provoke a claim of unconstitutional impairment of contract, present critically different factual contexts from the case here. . . . Moreover, in *Columbia Railway* and *Terre Haute* the Supreme Court asserted that the state decision in each case could not withstand judicial analysis independent of the legislation allegedly implemented. By contrast, where the state decision is based on supportable grounds independent of a later statute, the federal courts must accept the state court ruling on state law." 511 F.2d at 859.

Thus, the "exception" is nothing more than an appliction of the rule in a case in which a state court by implication applies subsequent adverse legislation without an express reliance on the later statute. The elements established in *Cross Lake* are not affected.

The second exception cited by Petitioners has no relevance to the general rules on unconstitutional impairment of contracts. Interestingly, Petitioners rely solely on a 1942 Tenth Circuit opinion, *Hann* v. *City of Clinton, Oklahoma,* 131 F.2d 978 (10th Cir. 1942) as authority for establishment of an exception to this Court's holding in *Cross Lake*. The *Hann* case, in which jurisdiction was based on diversity, involved interpretation of Oklahoma statutes authorizing holders of city improvement bonds to enforce collection of assessments. The decision is peculiar to interpretation of statutes regulating issuance of

bonds as the court explained in the opening sentence of the paragraph from which Petitioners quote:

> "The well-recognized rule obtains in Oklahoma that the law existing at the time of issuance of bonds and authorizing their issuance enters into and becomes an essential part of the contract in such way that the obligation of the contract cannot be impaired or its fulfillment hampered or obstructed by subsequent change in the law." 131 F.2d at 983.

The court relied exclusively on Oklahoma jurisprudence and cited no federal statute or decision in support of its holding. Likewise, the court made no reference to *Cross Lake*, *Terre Haute* or *Columbia Railway*. The case does, however, involve a holding that a 1923 statute should be applied in determining the rights of the holders of city bonds issued while that statute was effective and before the enactment of a 1939 statute which was adverse to the bondholders' claims. Thus, this "exception" is peculiar to bond statutes, but even if it were generally applicable and even if the Tenth Circuit could contradict a holding of the United States Supreme Court, the case would provide only that a settled judicial construction of a statute effective at the time the contract was entered must be applied despite the existence of a *subsequent adverse statute*.

Notwithstanding Petitioners' claimed exceptions, the elements established in *Cross Lake*, *supra*, clearly remain the law. A subsequent adverse statute, favorable law at the time of the contract, and a decision applying the subsequent statute to deprive claimant of contract rights are required even under Petitioners' reading of the cases they cited.

Petitioners' attempt to apply those authorities to the facts of the present case amply establish the obvious absence of any federal question. The only subsequent statutes cited by Petitioners as relevant to the issues decided by the Louisiana Supreme Court are Louisiana Act 332 of 1958 and Article 40 of the

Louisiana Mineral Code (La. R.S. 31:40), effective January 1, 1975.[15] Although both these statutes are subsequent to the contract date, neither is adverse to Petitioners. In fact, Petitioners cite both provisions in support of their position.

The absence of a subsequent adverse statute creates an irremediable gap in Petitioners' claim. The fact that the statutes which Petitioners seek to apply to the contract are subsequent to the contract and are favorable to them and adverse to Respondent has an additional effect. Adoption of *Petitioners'* argument would create an unconstitutional impairment of *Respondent's* contract rights. Petitioners are asking the Court to apply subsequently enacted statutes favorable to them, but the obvious result of the Court's doing so would be to unconstitutionally impair *Respondent's* rights under the 1956 agreement by application of subsequently enacted adverse statutes.

Finally, in endeavoring to meet the requirement that the law at the time of the contract be favorable, Petitioners cite, in addition to the 1958 statute and the Mineral Code, the official Comment to Article 40 of the Mineral Code. The entire Comment, a portion of which is quoted in the Petition at page 14, states:

> "Article 796 of the Civil Code provides that the mode of servitude is subject to prescription as well as the servitude itself. Article 40 assures that Article 796 of the Civil Code will not be applicable to mineral servitudes unless parties

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[15] Article 40 of the Louisiana Mineral Code is quoted in footnote 8, *supra*, page 4. Act 332 of 1958 was enacted by the Louisiana Legislature to codify then existing jurisprudence concerning the date on which the ten year prescription of non-use commenced to run, and had nothing at all to do with *mode of use* prescription. Like the federal constitutional questions now raised by Petitioners, the possible pertinence of Act 332 of 1958 was raised very late during the course of the litigation, namely on application for second rehearing. It was never mentioned in the opinion of any Louisiana court.

make some express agreement regarding prescription of mode of use. It is unrealistic and inequitable to provide that after conducting drilling and production operations for an extended period of time a servitude owner could not then mine the same or different minerals by a different method.

"Article 798 of the Civil Code provides that if a servitude is used less extensively than the right given in the title creating it, the servitude is reduced to that which is preserved by possession during the prescriptive period. This article has not been applied to a mineral servitude except in the case of Ohio Oil Co. v. Ferguson, 213 La. 183, 34 So.2d 746 (1948), in which the servitude owner sold to another all of his rights in a specified portion of the servitude tract. However, the question of the applicability of this article where only one mineral has been produced during the prescriptive period has not been raised in the jurisprudence. The intent of Article 40 is to assure that Article 798 of the Civil Code will not be applied to limit the extent of an interruption by operations for discovery and production of or actual production of one mineral. Additionally, it is intended that use of one particular method of mining would not exclude other forms. Thus strip mining would not exclude shaft mining or drilling."

Rather than stating that the law before 1974 was the same as the provision to which the Comment applies, the Comment makes plain that Article 40 was adopted to "assure" that the existing Civil Code Article 796 would not be applied to mineral servitudes, and that Civil Code Article 798, which *had* been applied in at least one instance to a mineral servitude, would not receive expanded judicial application.

Petitioners themselves are forced to admit in the Petition, page 13, that:

"With respect to the mode of use issue, in 1956 there was no specific Louisiana statute governing the question of mode of use of a mineral servitude, such as now found in La. R.S. 31:40, n.3 supra, enacted in 1974. Moreover, no Louisiana court had decided the precise issue."

The absence of a subsequent adverse statutue and of a favorable existing statute in this case renders impossible Petitioners' efforts to establish a federal question for impairment of contract rights. The Louisiana Supreme Court's decision could not have unconstitutionally applied adverse subsequent legislation because no such legislation exists. The Petition simply fails to state facts sufficient to meet any of the elements of the constitutional claim.

2. The law at the time of the 1956 contract was adverse to applicants and was properly applied by the Louisiana Supreme Court.

The decision by the Louisiana Supreme Court correctly acknowledged that the law at the time of the contract (1956) and upon the accrual of mode of use prescription ten years later, was the law to be applied. It held that Article 40 of the Mineral Code, effective January 1, 1975, was not the same as the prior law, and that by 1975, "whatever rights plaintiff [Respondent] had were vested." [16]

Under the facts presented, it is scarcely significant whether the Louisiana Supreme Court correctly interpreted the controlling law, *i.e.* the law in effect in 1956 and 1966, but it is clear that the interpretation was the proper one. Articles 796 and 798 of the Louisiana Civil Code, which were originally enacted in 1825, [17] formed the basis of the Louisiana Supreme Court's opinion. Petitioners are correct in asserting that no case had ever arisen which caused the courts to expressly apply the articles so as to extend mode of use prescription to mineral servitudes. However, to the extent that the jurisprudence had addressed the issue, the decisions were favorable to Respondent and adverse to Petitioners. The Louisiana Supreme Court relied on its own reading of the articles and on the indications in prior

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[16] Petition, page A-26.

[17] Articles 792 and 794, respectively, of Louisiana Civil Code of 1825.

jurisprudence in holding that the law prior to the 1974 Mineral Code was that Petitioners' right to search for and capture lignite had prescribed.

In *Trunkline Gas Co. et al.* v. *Steen, et al.*, 249 La. 520, 187 So.2d 720 (1966) the Louisiana Supreme Court had stated that "the articles of the Civil Code in Title IV, [which include Articles 796 and 798] entitled 'of Predial Servitudes or Servitudes of Land,' whenever applicable, were controlling" in respect of mineral rights.[18] Additionally, the Louisiana Supreme Court in 1946 in *Ohio Oil Co.* v. *Ferguson*, 213 La. 183, 34 So.2d 746 (1946), had applied Civil Code Article 798 in determining a mineral servitude owner's rights, and in *Louisiana Petroleum Co.* v. *Broussard*, 172 La. 613, 135 So.1 (1931) that court specifically mentioned the applicability of Civil Code Articles 796 through 800 to mineral servitudes in holding that the mineral owner had not interrupted prescription since he had not exercised his servitude in the manner contemplated.

Based upon these and other cases indicating that Civil Code Articles 796 and 798 should be applied to mineral servitudes, the Louisiana Supreme Court correctly concluded in the present case:

> "We now find that, since the right to explore and capture lignite was not used, the defendant's mineral servitude to strip-mine for lignite expired in 1966. Since that time, the plaintiff, as landowner, has been in possession of this prescribed right." Petition, page A-30.

As previously noted, the court did not discuss Act 332 of 1958, because that statute clearly did not apply to prescription of a *mode of use* of a servitude and was otherwise inapposite to the controversy. Petitioners have consistently confused the issues of the general rules on ten year prescription for non-use of a servitude and the corollaries of the general rule expressed in

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[18] Petition, page A-28.

Articles 796 and 798 regarding prescription of a particular mode of use of a servitude after ten years. In the Petition, they have cited *Levy* v. *Crawford, Jenkins and Booth, Limited*, 194 La. 757, 194 So. 772 (1940), *Lee* v. *Giauque*, 154 La. 491, 97 So. 669 (1923) and *Mays* v. *Hansbro*, 222 La. 557, 63 So.2d 232 (1953), all of which deal with the general rule regarding ten year prescription for non-use and none of which has any relevance to the mode of use prescription on which the Louisiana Supreme Court based its decision. Petitioners impliedly acknowledge the irrelevance of these decisions to the only pertinent prescription issue in the case by admitting that no court has decided the precise mode of use issue. (See Petition, page 13.)

Petitioners have failed to adequately establish the existence of a federal question based on unconstitutional impairment of contract. The Louisiana Supreme Court interpreted statutes involving a particular question of Louisiana property law which had been in effect for a century and a half, and which by admission of all parties, had *never* been specifically construed as they affected mode of use prescription of mineral servitudes. No subsequent adverse statute existed so, obviously, none was applied; no favorable statute — or decision — existed for Petitioners in 1956 and the Louisiana Supreme Court properly interpreted the effective law at that time. Conversely, acceptance of Petitioners' position would result in an unconstitutional impairment of Respondent's contract rights. Petitioners cannot identify, and have not shown in the Petition, any plausible claim of a federal question based on an alleged law impairing the obligation of the parties' contract.

B. Petitioners Allege That The Judgment Of The Louisiana Supreme Court Does Not Conform To The Mandate Of The Louisiana Constitution And Thereby Deprives Petitioners Of Their Property Without Due Process Of Law.

Petitioners' efforts to construct a federal question from the due process clause based on the facts of this case are equally

fruitless. The issue raised by Petitioners as a violation of federal due process is that the Louisiana Supreme Court misconstrued the Louisiana Constitution by rendering a judgment in which a majority of the justices agreed on the judgment but arguably did not agree on the *reasons* for judgment.

Three reasons compel the rejection of Petitioners' arguments: (i) Petitioners do not (and cannot) allege that the United States Constitution requires majority agreement on the reasons for the judgment of a state or federal court; (ii) the Louisiana Constitution does not require a majority to concur in the *reasons* for a judgment; and (iii) no federal question is raised by the interpretation placed on the Louisiana Constitution by the Louisiana Supreme Court.

First, Petitioners do not assert that the federal constitutional requirements for due process include a requirement that a majority of the justices agree on the *reasons* before rendering the judgment. [19] In view of the well settled holdings of this Court to the contrary, such an assertion could not have been made. In *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949), Justice Frankfurter explained in his dissent the unusual division of opinion of the Court, which reversed the Court of Appeals:

> "A substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected — but not the same majority. And so, conflicting minorities in

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[19] An argument that federal due process requires that a majority concur in the reasons for judgment is unlikely since due process does not even require that the state provide an appeal. *Oswein* v. *Schwab*, 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973); *Lindsey* v. *Normet*, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972); *Griffin* v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *McKane* v. *Durston*, 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed 867 (1894).

> combination bring to pass a result — paradoxical as it may appear — which differing majorities of the Court find unsupportable." 337 U.S. at 655. [20]

A similar situation occurred in *Gosa* v. *Mayden*, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973). Although the five Justices comprising the majority were split on the reasons for their votes, the Court of Claims in *Augenblick* v. *United States*, 509 F.2d 1157 (U.S. Ct.Cl. 1975) correctly relied on the decision, stating:

> "It is immaterial that less than a majority of the Court upheld the legal proposition that O'Callahan should not be applied retroactively; the important thing is that a majority voted that O'Callahan should not control cases like the present one." 509 F.2d at 1159.

Other judgments rendered by this Court in spite of a variance of opinion on the reasons for the judgment include: *Braunfield* v. *Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961); *Glidden Company* v. *Zdanok*, 370 U.S. 530, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962); *Ker* v. *California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); *James* v. *United States*, 366 U.S. 213, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1961); and *Screws* v. *United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945).

Consequently, Petitioners' sole basis for assertion of a federal question on this ground depends upon a determination that a failure by the Louisiana Supreme Court to construe properly an article of the Louisiana Constitution constitutes a *per se* violation of the due process clause of the United States Constitution. It is clear, however, that the due process issue need not be reached because the Lousiana Court *did* properly apply the Louisiana Constitution, as most persuasively stated in the lan-

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[20] In the instant case, the conflict was not as severe. See footnote 11, *supra*, page 5, and Petition, page A-23, et seq.

guage of the Louisiana Constitution itself. Article 5, Section 3 of the Louisiana Constitution of 1974 provides, in its entirety:

> "The supreme court shall be composed of a chief justice and six associate justices, *four of whom must concur to render judgment*. The term of a supreme court judge shall be ten years." (Emphasis added)

The emphasized phrase forms the sole basis for Petitioners' claim that a decision of the Louisiana Supreme Court in which three of the seven justices held that Petitioners' rights to lignite had prescribed and two of the seven justices concurred in the judgment because they found that Petitioners *never had* the right to lignite is a violation of the "mandate of the Louisiana Constitution."[21] Although Respondent submits that additional argument is unnecessary, the following background on the Louisiana constitutional provision and its interpretation is offered.

The 1921 Louisiana Constitution was in effect prior to Louisiana's adoption of a new constitution, effective January 1, 1975. The parallel section of the earlier constitution, Article 7, § 4, provided:

> "Except when judges of other courts are called in, as elsewhere provided in this Constitution, the Supreme Court shall be composed of a Chief Justice and six Associate Justices, four of whom shall concur to render judgment when the court is sitting en banc, and whenever so sitting, *if four members cannot for any cause concur in any case*, . . . the court shall have authority to call on any judge of the Courts of Appeal, or District Courts, whose duty it shall be, when so called upon, to sit in any and all cases as the court may direct." (Emphasis added)

The Records of Louisiana Constitutional Convention of 1973: Convention Transcripts, Volume VI, Thirtieth Day, page 708, contain the following explanation of the new provision by

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[21] Petition, page 4.

Louisiana Supreme Court Justice James L. Dennis, who was a delegate to that convention:

> "this [Article 5, Section 3] continues the present provisions in substance, there has been some simplification of the language but there has been no essential change from the present constitution."

The intention of the authors of the new provision is significant not only because the emphasized language in the quotation of the 1921 provision above indicates that concurrence "for any cause" is sufficient, and was not meant to be changed, but also because the Louisiana Supreme Court and courts of appeal have provided an interpretation of the provision, in practice, for many years. Petitioners' interpretation of the provision would render suspect every *per curiam* opinion and would invalidate every judgment in which a concurring judge's vote was necessary to the judgment. It would effectively make a concurring opinion, in a case in which the concurring vote was needed for a majority, a dissenting vote. Certainly, if the authors of the 1974 constitutional provision had intended such a dramatic change in judicial procedure, they would have said so expressly. Indeed, rendition by the Louisiana Supreme Court of final judgment in the instant case, is, in effect, an interpretation of the 1974 Louisiana Constitution as requiring only that a majority of justices concur in the decree.

Nor is the present interpretation limited to the 1974 and 1921 Louisiana constitutions. As long ago as the turn of the century, in *Losecco* v. *Gregory*, 108 La. 648, 32 So. 985 (1901) the Louisiana Supreme Court, then comprised of only five justices, rendered judgment on a main demand and a reconventional demand (counterclaim) despite the variance in the reasoning of the justices constituting the majority. The court, on rehearing, explained:

> "Plaintiff also complained that a majority of the court had not concurred in the judgment. The complaint was unfounded. Three members of the court had concurred in

> the *decree* rejecting plaintiff's demand, and three had concurred in the *decree* rejecting the reconventional demand." 108 La. at 666. (Emphasis added)

Recently the Louisiana Supreme Court was given an unusual opportunity to comment on the variety of reasons on which its judgment was based because the case was remanded, on grounds unrelated to the different reasons for the opinion, by this Honorable Court. On remand, the court expressly acknowledged that the majority in the original decision did not agree on the reasons for judgment. Although the issue was not specifically raised, [22] the court in *Loyacano* v. *Loyacano*, 375 So.2d 1314 (La. 1979), as in the instant case, was unquestionably aware of the circumstances and, by rendering a final judgment despite the differences, provided its interpretation of Article 5, Section 3. Clearly, Article 5, Section 3 of the 1974 Constitution did not change the well established practice of the Louisiana courts and did not intend to give an entirely new meaning to the word "concur."

Finally, even if the interpretation offered by Petitioners were otherwise plausible, no federal question is raised by the interpretation of a provision of a state constitution. *Manley* v. *Park*, 187 U.S. 547, 23 S. Ct. 208, 47 L.Ed. 296 (1903); *Lent* v. *Tillson*, 140 U.S. 316, 11 S. Ct. 825, 35 L.Ed. 419 (1890).

C. Petitioners Allege That The Judgment Of The Louisiana Supreme Court Deprives Petitioners Of Equal Protection Of Law.

The basis for Petitioners' equal protection argument is unclear. Apparently, Petitioners claim that the result of the failure

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[22] Respondent's research did not reveal a single case, either before or after the 1974 Constitution, in which the issue was raised, though Respondent found numerous cases in which the vote of a judge concurring for different reasons was necessary to form a majority. Apparently, none of these losing parties shares Petitioners' views on Article 5, Section 3 of the 1974 Louisiana Constitution.

of a majority of the justices of the Louisiana Supreme Court to concur in the reasons for judgment is that the opinion will not be binding on subsequent litigants raising the same issues. Petitioners cite no authority for their position that a violation of equal protection results. In fact, in each of the cases cited by Petitioners, this Court held that the *judgment* of an *equally divided* court [23] is fully binding on the parties though the *reasoning* does not bind future litigants or courts. *Hertz* v. *Woodman*, 218 U.S. 205, 30 S.Ct. 621, 54 L.Ed. 1001 (1910); *U.S.* v. *Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942); and *U.S.* v. *Friedman*, 528 F.2d 784 (10th Cir. 1976). No equal protection issue was ever discussed in any of the cases and they each expressly found that the divided decision was binding on the parties.

Further, application of Petitioners' position by the Louisiana Supreme Court would have produced an absurd result. Assuming that a majority could not reach a decision on the same grounds, [24] adoption of Petitioners' argument would obviously result in the inability of the court to render any judgment at all. In the cases cited above, an *equally* divided court affirmed the lower court judgment. If such a judgment has no effect on future litigants and if the absence of such effect is an equal protection violation, the Louisiana Supreme Court could not have rendered any judgment — not even a judgment affirming the Court of Appeal.

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[23] The court in the instant case was not equally divided. A five-to-two majority decided the case for Respondent.

[24] This is quite unlikely in the instant case. The two concurring justices did not *disagree* with the other three judges in the majority. Those two simply did not reach the issue of prescription, since it was irrelevant to their opinion on the interpretation of the contract.

Petitioners undermine any claim of unequal treatment in the Petition at page 17. In alleging a violation of equal protection, they claim that:

> "The only persons whose rights will be determined by the opinion of the Louisiana Court are those involved in this particular case. It is a denial of Petitioners' right to equal protection under the Fourteenth Amendment, as well as the state constitution to deprive them of their property on the basis of a ruling applicable only to them and binding on no others."

Later, on the same page, Petitioners argue that this Court should grant the Petition because:

> "The case is important not only because millions of dollars are involved but because all mineral owners in Louisiana will be affected by the outcome of this suit."

Although the relevance of the alleged failure of the court to follow Article 5, Section 3 of the Louisiana Constitution to Petitioners' equal protection argument is unclear, it is obvious that the Louisiana court did properly apply that provision for the reasons set forth in Section B, *supra*. The only possible relevance Respondent can conceive is that Petitioners are claiming that the provision has been applied differently in other cases. Of course, no such case was cited by Petitioners, nor did Petitioners assert that one exists.

III.
CONCLUSION

Petitioners have clearly failed to raise a federal question sufficient to invoke the jurisdiction of this Court. The efforts to establish an impairment of contract claim lead to the inevitable conclusion that not only do Petitioners lack such a claim but that acceptance of Petitioners' argument would result in an unconstitutional deprivation of Respondent's contract rights.

The second and third reasons asserted for granting the Petition are claims of deprivation of property without due process and denial of equal protection of the law. The claims depend on an untenable construction of Louisiana's constitution and would require this Court to construe that constitution contrary to all precedent. Petitioners have not provided any authority in either case for the assertion that the due process and equal protection clauses have been violated.

The Petition for a Writ of Certiorari to the Supreme Court of Louisiana should be denied because no federal question is raised.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

March, 1982

Appendix

THE CONTINENTAL GROUP, INC.

Subsidiaries Not Wholly Owned

Nihon Harrison Ltd.

National Cup & Container Co., Ltd.

Envolturas Industriales, S.A.

Shellmar de Columbia, S.A.

Convertidora Venezolana de Papel, C.A.

Peachtree Generating Corp.

Fibro Tambor S.A. de C.V.

Braskraft S.A. Florestal c Industrial

The Vinoxen Company, Inc.

Containers Limited

Envases Generales Continental de Mexico, S.A.

Kuwait Metal Container Company, Ltd.

Continental Can Hong Kong, Limited

Continental Can Saudi Arabia, Ltd.

Doosan Continental Can Manufacturing Co., Ltd.

Fabricana Boliviana de Envases Sociedad Anonima

Industrias del Norte, S.A.

Continental Produtos Metalurgicos Ltda.

Metalurgica Matarazzo S.A.

Matcan Embalagens Ltda.

Mill Paper Fibres Limited

Schmalbach-Lubeca GMBH

Elbatainer France

Elbatainer (U.K.) Ltd.

Ets Schuybroek S.A.

Sobemi N.V.

Verblifa N.V.

De Clerck N.V.

Societe Pour le Developpement et L'Expansion D'Entreprises (SDE)

The Life Insurance Company of Virginia

Lawyers Title of Arizona

Ontario Title Insurance Agency

Long & Melone, Ltd.

Sentinel Escrow, Ltd.

Lawyers Title Company of Idaho

St. Francis County Abstract Company, Inc.

Lawyers Abstract Corporation

Lawyers Abstract Company

Bayport General Agency, Inc.

Dominguez Continental, S.A.

Supron Energy Corporation (tender offer now pending)

SUPREME COURT OF LOUISIANA
DOCKET NO. 67,188

THE CONTINENTAL GROUP, INC.,

v.

J. L. ALLISON, JR., *et al*

MOTION TO VACATE AND SET ASIDE JUDGMENT

NOW INTO COURT, through undersigned counsel, come J. L. Allison, Jr., et al, Movants, who move this Honorable Court to vacate and set aside the judgment rendered on rehearing in this case on October 8, 1981 in that said judgment violates Article 5, Section 3 of the Louisiana Constitution of 1974, for the following reasons:

1.

In its original Opinion dated January 26, 1981, all seven Justices of this Honorable Court concurred in affirming the judgment of the Court of Appeal in favor of Movants.

2.

In this Court's Opinion on Rehearing, which reversed its original Opinion, a majority of this Court did not concur in the reasons given for judgment.

3.

Failure of a majority to concur violates Article 5, Section 3 of the Louisiana Constitution of 1974, which reads, in pertinent part, as follows:

> "The supreme court shall be composed of a Chief Justice and six associate Justices, *four of whom must concur to render judgment* . . ."
> (emphasis added)

4.

As can be seen from a review of the Opinion on Rehearing, four members of this Honorable Court did not concur in the reasons for rendering judgment adverse to movants. Specifically:

(a) Justices Calogero and Watson dissented from the Opinion on Rehearing:

(b) Justices Blanche and Marcus were of the opinion that the pertinent servitudes granted to Movants the right to explore for and remove lignite, but such right had prescribed;

(c) Chief Justice Dixon was of the opinion that Movants' right to explore for and possess lignite had prescribed; and

(d) Justices Dennis and Lemmon were of the opinion that the servitudes in this case did not grant to Movants the right to mine lignite.

5.

As a result of the foregoing, it can be seen that a majority of this Honorable Court did not concur and thus, the Opinion on Rehearing violates Article 5, Section 3 of the Louisiana Constitution of 1974.

6.

As this Court pointed out *Suhor* v. *Gusse*, 388 So2d 755 (La. 1980) in Footnote 3 on page 756:

> "On rehearing before a panel of five Judges, the judgment of the trial court was affirmed for lack of a majority to change it."

Here, since no majority of this Court concurred in the reasons assigned for the Opinion on Rehearing, the Original Opinion rendered on January 26, 1981 should be reinstated.

WHEREFORE, for the foregoing reasons, Movants, J. L. Allison, Jr., et al, pray that this Court vacate and set aside the Opinion on Rehearing rendered on October 8, 1981 and restore the Original Opinion granted on January 26, 1981.

Respectfully submitted,

WIENER, WEISS, MADISON & HOWELL

/s/ JOHN M. MADISON, JR.
John M. Madison, Jr.
411 CNB Building
Shreveport, Louisiana 71101

CERTIFICATE

I hereby certify that a copy of the above Motion was this day served on plaintiff, by placing a copy of same in the United States Mail, with proper postage affixed, addressed to all counsel of record:

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Shreveport, Louisiana, this 3d day of December, 1981.

/s/ JOHN M. MADISON, JR.
Of Counsel